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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1412

JOHN SCHILB, et al.,

Appellants,

vs.

VINCENT P. KUEBEL, Etc. et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

CIRCUIT COURT OF ST. CLAIR COUNTY

1969

July	29.	Complaint filed.
August	4.	Summons filed.
August	28.	Answer filed.
September	2.	Reply filed.
October	14.	Stipulation of Facts filed.

1970

January	6.	Order finding issues in favor of defendants and dismissing plaintiff's complaint.
January	9.	Notice, Notice of Appeal and Affidavit of Service filed.
January	9.	Notice, Praecipe for Record, Certificate of Service filed.

SUPREME COURT OF ILLINOIS

1970

January	14.	Record of Circuit Court of St. Clair County filed.
February	2.	Brief of appellant filed.
February	16.	Brief of appelles filed.
March	16.	Excerpts of Record filed.
March	16.	Reply Brief filed.
March	16.	Brief of Amici Curiae, Matthew J. Danaher, et al. filed.
March	20.	Oral Argument.
April	10.	Brief of Amici Curiae, Andrews et al. filed.
October	7.	Opinion filed.
October	28.	Petition for Rehearing filed.
December	3.	Order denying Petition for Rehearing.
December	3.	Dissenting Opinion filed.
December	10.	Motion for Reconsideration of denial of Petition for Rehearing filed.

1971

January 14.	Order denying Motion for Reconsideration.
January 22.	Motion to Stay Mandate pending filing and disposition of appeal to the Supreme Court of the United States.
January 26.	Order Staying Mandate.
February 12.	Notice of Appeal to the Supreme Court of the United States filed.

[C-2] (July 29, 1969)

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, ILLINOIS

JOHN SCHILB, individually and in a representative capacity for and on behalf of each member of a class of persons who have since August 14, 1963 been, or who have hereafter been; (a) named in a criminal proceeding in the Circuit Court of St. Clair County, Illinois, or any Department or Division thereof; (b) required to post a deposit of bail security and was acquitted by the trial court, and; (c) who was required to pay as bail bond costs, 10% of the bail security, said person had deposited, under an act in relation to the deposit of bail security approved August 14, 1963,

Plaintiff,

vs.

VINCENT P. KUEBEL, as Clerk of Circuit Court of St. Clair County; MAURICE F. JOSEPH, as County Treasurer of St. Clair County; and COUNTY OF ST. CLAIR, ILLINOIS,

Defendants.

CIV-69-1455

COMPLAINT IN CHANCERY—CLASS ACTION

John Schilb, individually and in a representative capacity for and on behalf of each member of a class of persons who have since August 14, 1963 been, or who have hereafter been; (a) named in a criminal proceeding in the Circuit Court of St. Clair County, Illinois, or any Department or Division thereof; (b) required to post a deposit of bail security and was acquitted by the trial court, and; (c) who was required to pay as bail bond costs, 10% of the bail security, said person had deposited, under an act in relation to the deposit of bail security approved August 14, 1963, Laws 1963, p. 2836, Section 110-7, and complains of Defendants, Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, Maurice F. Joseph, as Treasurer of St. Clair County, Illinois, and the County of St. Clair, Illinois, and alleges as follows:

1. Defendant, Vincent P. Kuebel, is now and was at all times material hereto the duly appointed, qualified and acting Clerk of the Circuit Court of St. Clair County, Illinois.

2. Defendant, Maurice F. Joseph, is now and was at all times material hereto the duly elected, qualified and acting County Treasurer of St. Clair County, Illinois.
[C-3]

3. Defendant, St. Clair County, Illinois is and was at all times material hereto a duly existing corporate and politic body in Illinois.

4. Plaintiff, John Schilb, is a citizen and resident of the City of Belleville, St. Clair County, Illinois.

5. On to-wit: August 14, 1963, there was approved a certain act of the General Assembly of the State of Illinois as follows:

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the court to the accused at his last known address. If the

accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to the treasury of the county wherein the bond was taken. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

6. Thereafter the defendant, Vincent P. Kuebel, or his predecessors, as Clerk of the Circuit Court of St. Clair County, Illinois, and, Maurice F. Joseph, or his predecessors, as County Treasurer of St. Clair County, Illinois, acting under the provisions of the above mentioned acts collected from the plaintiff and a number of other persons, all of whom were defendants in criminal actions, [C-4]

and all of whom were acquitted by trial courts of their respective charges a sum equal to 10% of their respective deposits of bail security.

7. That on to-wit, the 16th day of January, 1969 the plaintiff was arrested and charged with leaving the scene

of an accident, under Case No. A4229, and that subsequent thereto, the plaintiff posted a bail security in the amount of $50.00 cash and on the same date was charged with obstructing traffic in Case No. A4533 and posted a bail security in the amount of $25.00 cash.

8. That on June 6, 1969, after a trial, the plaintiff was acquitted of the charge of leaving the scene and found guilty of obstructing traffic and was thereafter charged by and paid $7.50 to defendant, Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, under sub-paragraph (f) of Chapter 38, Section 110-7 "Deposit of Bail Security." Plaintiff states that there are large numbers of defendants to proceedings brought against them in the Circuit Court of St. Clair County, Illinois, similarly situated, but that the names and residences of such persons are unknown to the plaintiff. Plaintiff states that each of said persons is a member of a class of persons who have since August 14, 1963, been or who may or have been, (a) named as a defendant in a criminal action in the Circuit Court of St. Clair County, (b) required to file a deposit of bail security, and (c) required after trial, dismissal or acquittal to pay a sum equal to 10% of the bail security deposited.

9. Each member of the said class has a common interest in resisting the exaction of unconstitutional and improper charges made by the defendant, Vincent P. Kuebel, or his predecessors, as Clerk of the Circuit Court of St. Clair County, Illinois, under the guise of an act in relationship to the deposit of bail security, as well as in any fund which may arise by virtue of any decree of this court, which may be entered in connection with an unconstitutional collection of bail bond, costs.

10. Each member of said class has a common interest in the interpretation of the aforesaid act. Plaintiff states that as to the plaintiff and each of the members of the abovementioned class of persons, there is a common ques-
[C-5]
tion of law and fact and that a decision for the plaintiff in this case will settle the law as to each of the members of said class.

11. It is impractical if not impossible for all of said members of said class to be joined as parties to this suit. Therefore, in order to avoid a multiplicity of suits, the plaintiff brings this action in a representative capacity for and on behalf of each of the members of the abovementioned class, similarly situated, who will bear a proportionate share of the expenses of this litigation. Each of the members of this class would be entitled to relief identical to the relief which may be offered to the plaintiff in the event that the court awards relief to the plaintiff.

12. The action of the defendant, Vincent P. Kuebel, or his predecessors, as Clerk of the Circuit Court of St. Clair County, Illinois, in requiring defendants in criminal proceedings to pay a 10% bail bond cost is unconstitutional and deprives the said defendants of their property without due process of law, and in violation of the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States, and Article 2, Section 2 of the Constitution of the State of Illinois.

13. The action of the defendant, Vincent P. Kubel, or his predecessors, as Clerk of the Circuit Court of St. Clair County, Illinois, in requiring defendants in criminal proceedings to pay a 10% bail bond cost, is illegal,

arbitrary, capricious and in violation of the express terms of the Statutes and violates Article 2, Section 19 of the Constitution of the State of Illinois, which provides:

> "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation: he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly, and without delay."

14. Plaintiff states that each member of the class upon whose behalf this action is maintained, has been or will be required to pay a 10% bail bond cost.

15. An actual controversy exists between the plaintiff and each of the defendants in that defendants claim the right to impose a 10% bail bond cost on each acquitted defendant in a criminal proceeding, while plaintiff and each member of said class contends that the enactment of Section 110-7, sub-paragraph (f) "Deposit of Bail Se-

[C-6]

curity" is a deprivation of their rights and property in violation of the 14th Amendment of the Constitution of the United States, and Article 2, Sections 2 and 19 of the Constitution of the State of Illinois.

WHEREFORE, plaintiff prays:

1. That the court decree that this action has been properly commenced as a class action.

2. That the court declare the collection of bail bond costs in criminal proceedings heretofore and hereafter filed in the Circuit Court of St. Clair County, Illinois in cases wherein the defendant in said proceedings has been acquitted or found guilty, and declare said collection to be illegal, null and void.

3. That the court declare that the plaintiff and the members of the class of persons upon whose behalf this action was instituted, be entitled to a refund of all bail bond costs charged against them.

4. That this court enter a binding declaration that Section 110-7, sub-paragraph (f) of the Code of Criminal Proceedings be declared to be unconstitutional and void.

5. That the amounts heretofore collected upon the forfeiture or upon the collection of said bail bond costs be declared to be collected improperly and illegally.

6. That the defendant, Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, be required to account to plaintiff and to each of the members of the class of persons upon whose behalf this action was commenced as to all sums which were illegally and improperly collected as bail bond costs, and those sums which have been heretofore collected from defendants in cases wherein the defendants in criminal proceedings were acquitted and or found guilty by the trial courts.

7. That the court determine the amount of refund, if any, the plaintiff and each of the members of the class upon whose behalf this action was maintained, shall be entitled to and to direct the payment of such refunds to the persons entitled thereto, less reasonable attorney's fees to be fixed by the court.

[C-7]

8. That the court direct the defendant, Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, to segregate all sums which may in the future be collected as bail bond costs, from all defendants whether acquitted or found guilty in criminal proceedings.

9. That the court direct that the defendant, Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, determine the amount which has been collected by his office from acquitted and guilty defendants since August 14, 1963, forthwith, and that he be directed to notify defendant, Maurice F. Joseph, as County Treasurer of St. Clair County, Illinois, the amount of such sum within a short time to be fixed by the court.

10. That instanter upon receipt of notice of such amount from the aforesaid Clerk of the Circuit Court, defendant, Maurice F. Joseph, as County Treasurer of St. Clair County, be directed to segregate from the funds then in hand in the County Treasurer's Office a sum equal to the amount furnished by the aforesaid Circuit Clerk as representing amounts collected by courts of record in St. Clair County, Illinois, as bail bond costs from defendants who were acquitted and found guilty by trial courts, since August 14, 1963, and to deposit said amount in a special fund subject to the further order of this court, or in the alternative, with an escrowee, to be designated by the court and subject to further order of the court.

11. That the attorney for the plaintiff and members of the class upon whose behalf this proceeding was instituted be awarded reasonable attorney's fees.

12. That for good cause shown the above mentioned order be issued without bond.

13. That the plaintiff and the members of the class upon whose behalf this action was instituted, may be awarded such further and other relief as equity may require.

SAM S. PESSIN,
Attorney for John Schilb.

Sam S. Pessin
Attorney at Law
25 West Main Street
Belleville, Illinois 62220
234-8484

[C-8]

(Jurats and Affidavit Omitted in Printing)

[C-9]

(Summons Filed August 4, 1969 Omitted in Printing)

[C-10]

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, ILLINOIS

(Title Omitted in Printing)

(August 28, 1969)

ANSWER

Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County; Maurice F. Joseph, as County Treasurer of St. Clair County; and St. Clair County, Illinois, defendants, for Answer to the Complaint filed herein say:

1. Defendant, Vincent P. Kuebel, admits the allegations of Paragraph 1 of the complaint. And, for further answer, says that he was not appointed, qualified, and acting clerk of the Circuit Court of said county until January 27, 1969.

2. Defendant, Maurice F. Joseph, admits the allegations of Paragraph 2. And, for further answer, says that he was not the acting county treasurer of St. Clair County, Illinois during all of the time as alleged in the complaint.

3. Defendant, St. Clair County, Illinois, admits the allegations of Paragraph 3.

4. Defendants are not sufficiently informed as to the allegations of Paragraph 4 and for that reason deny same.

5. They admit the allegations of Paragraph 5.

6. They admit the allegations of Paragraph 6. And, for further answer, say that they had full authority so to do in accordance with Paragraph (f) of the Act quoted in Paragraph 5.

7. They admit the allegations of Paragraph 7.

[C-11]

8. They deny that on June 6, 1969, after a trial, the plaintiff was acquitted of the charge of leaving the scene of an accident, and found guilty of obstructing traffic, and was thereafter charged by and paid $7.50 the defendant, Vincent P. Kuebel, Clerk of the Circuit Court of St. Clair County, Illinois, under sub-paragraph (f) of Chapter 38, Section 110-7 "Deposit of Bail Security." They further deny that there are large numbers of defendants to proceedings brought against them in the Circuit Court of St. Clair County, Illinois, similarly situated, but that the names and residences of such persons are unknown to the plaintiff, and they further deny all of the other allegations in said paragraph. And, for further answer, the defendants say that the true facts are that

John Schilb on June 6, 1969 plead guilty to the charge of leaving the scene of an accident and also plead guilty to the charge of obstructing traffic, and further say that he furnished cash bond and that he was refunded $17.50.

9. They deny the allegations of Paragraph 9.
10. They deny the allegations of Paragraph 10.
11. They deny the allegations of Paragraph 11.
12. They deny the allegations of Paragraph 12.
13. They deny the allegations of Paragraph 13.
14. They deny the allegations of Paragraph 14.
15. They deny the allegations of Paragraph 15.

WHEREFORE, defendants pray that the Court deny the relief prayed for by the plaintiff in Paragraphs 1 through 13, and that this case be dismissed at plaintiff's cost.

ROBERT H. RICE,
State's Attorney,
Attorney for Defendants.
By: EUGENE H. WIDMAN,
Assistant State's Attorney.

Courthouse
Belleville, Illinois
Tel. 233-0930
[C-12]

(Jurat and Affidavit Omitted in Printing)

[C-13]

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, ILLINOIS

(Title Omitted in Printing)

(September 2, 1969)

REPLY

Plaintiff, John Schilb, by his attorney, Sam S. Pessin, for reply to defendants' answer states:

8. In reply to the further statements of defendants in paragraph 8 of their answer, this plaintiff states that on two charges filed against him there were findings of guilty and on two charges there were dismissals, which were tantamount to being found not guilty as to such charges dismissed; that there may have been a ministerial error in the writing up of the findings and judgments in each of the four cases but that in essence there would be no change in the actual issues in this case.

SAM S. PESSIN,
Attorney for Plaintiff.

Sam S. Pessin
Attorney at Law
25 West Main Street
Belleville, Illinois 62220
234-8484

[C-14]

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, ILLINOIS

(Title Omitted in Printing)

(October 14, 1969)

STIPULATION

It is stipulated and agreed by and between the parties hereto by their respective attorneys as follows:

1. Defendant, Vincent P. Kuebel, is the duly appointed, qualified and acting Clerk of the Circuit Court of St. Clair County, Illinois, having succeeded his predecessor in office Press Waller; said defendant and his said predecessor were at all times the holders of said office since August 14, 1963.

2. Defendant, Maurice F. Joseph, is the duly elected, qualified and acting Treasurer of St. Clair County, Illinois, and as such officer is the custodian of all funds collected by the aforesaid Circuit Clerks as the 10% bail bond costs under the provisions of Section 110-7(f), Chapter 38, Ill. Rev. Stats., 1963.

3. St. Clair County is now and for more than 50 years last past was a corporate and politic body in Illinois.

4. At all times relevant to the issues of this cause, plaintiff, John Schilb, has been a citizen and resident of the City of Belleville, St. Clair County, Illinois.

5. On On October 14, 1963 the Illinois General Assembly's following act was approved and has been since complied with in said County, the provisions of said Act being as follows: * * *" (Section 110-7, App. A).

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

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(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by

the court to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to the payment of the judgment and transferred to the treasury of the county wherein the bond was taken. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

* * * 6. Since adoption of said Act, defendants, Vincent P. Kuebel and Maurice F. Joseph, and their predecessors in office, acting under the provisions thereof, collected from plaintiff and many other defendants in criminal actions, who were acquitted by trial courts of their respective charges, a sum equal to 10% of their respective deposits of bail security; said collections of said sums by said county officials were made in good faith in accordance with their oaths of office as understood by each of them and under color of the authority of said Act.

7. On January 16, 1969 plaintiff was arrested and charged with (a) leaving the scene of an accident and

posted $50.00 cash bail security thereon and also (b) obstructing traffic and posted $25.00 cash bail security thereon; on June 6, 1969 he was found guilty on one of said charges and not guilty on the other charge and was charged (in addition to any fine) and paid $5.00 and $2.50 for a total of $7.50 as an additional cost charge for such bail.

8. There are a large number of defendants in criminal proceedings in said court who posted cash bonds, and either after being found guilty (whether by trial or

[C-16]

on plea) or being found not guilty (either by trial or dismissal of the charges), and in each instance there was paid by such defendants and collected by said officials the 10% charge under the provisions of said Act.

9. The essential questions of fact, as concerns the issue in this cause, are similar as to all defendants in all criminal cases in the Circuit Court of said County since the effective date of said Act as to all defendants who posted cash bail security; the questions of law are similar in all such cases also as pertains to the issues of this cause and the issue of the alleged unconstitutional collection of bail bond costs is common to the interest of such defendants in criminal cases in said court.

10. There is a bona fide dispute in this cause, brought without collusion of either of the parties hereto, and it is impractical, if not impossible, to join all members of the class to which plaintiff belongs, as parties to this action; this action will avoid undue and unnecessary multiplicity of actions; plaintiff brings this action in a representative capacity for and on behalf of each of the members of the class with whom his interests as de-

scribed herein are similar; who should proportionately bear a share of the cost of this litigation; the relief to which the members of said class would be entitled is identical to the relief to which plaintiff would be entitled, in the event of an award of relief herein.

11. Since the adoption of said Act substantial sums of money have been collected by said county officials from the aforesaid defendants in criminal cases for the said 10% withholding charges or costs after disposition of their respective cases; an exact account of all of said collections are present in the records of said offices and shall be agreed upon by the parties hereto for subsequent purposes in the event of the Court's awarding relief sought for herein by plaintiff.

[C-17]

12. Section 110-8 of said Chapter 38, in essence, provides for depositing of cash, stocks or bonds in full amount of bail or pledging interests in real estate double the amount of the amount of bail fixed, without payment of any fee.

13. The fixing of the amount of bail in each particular criminal case is not done by either County Treasurer or Circuit Clerk but by a judge of said court, whose discretion in such respect is not guided by statute, rule of court or any definite, fixed standard; various and divers judges in fact fix the amount of bail for the same types of offenses at various and divers amounts, without relationship as to guilt or innocence of the particular defendant in a criminal charge, and without relationship of the particular offense charged and the bail fixed.

14. The actual cost of administering the provisions of said Sections 110-7 and 110-8 are substantially the

same but there may probably be a slightly greater cost in the administration of Section 110-8.

15. The sole issue for determination by the court presently is one of law; plaintiff contends that said Section 110-7 is unconstitutional and defendant contends otherwise.

16. That plaintiff shall file his supporting memorandum within 5 days of filing this stipulation; defendants shall file their answering memorandum thereto within 10 days thereafter and plaintiff his reply thereto within an additional 5 days.

SAM S. PESSIN,
Attorney for Plaintiff.
ROBERT H. RICE, State's Atty.,
Attorney for Defendants.
By: EUGENE H. WIDMAN,
Assistant State's Attorney.

[C-18]

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, ST. CLAIR COUNTY, ILLINOIS
(Title Omitted in Printing)
(January 6, 1970)

ORDER

This case having been submitted to the Court on Stipulation of Facts, and the Court having examined same, and the briefs of the plaintiff and defendants having been filed and considered by the Court;

The Court finds the issues in favor of the defendants and against the plaintiff and, particularly, finds that Section 110.7, Sub-paragraph (f) of the Criminal Code proceedings is constitutional;

WHEREFORE, IT IS ORDERED that the plaintiff's complaint be and is hereby dismissed at plaintiff's cost.

Dated: June 6, 1970.

ENTER:

JAMES W. GRAY,
Associate Circuit Judge.

[C-19]

APPEAL TO THE SUPREME COURT OF ILLINOIS,
FROM THE CIRCUIT COURT
20TH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY, ILLINOIS

January 9, 1970)

(Title Omitted in Printing)

You are hereby notified that plaintiff-appellant, John Schilb, individually and in a representative capacity for and on behalf of a class of persons, described in the complaint in the above entitled cause, has filed on January 9, 1970, his Notice of Appeal in the above cause, copy of which is attached hereto.

SAM S. PESSIN,
Attorney for Plaintiff-Appellant,
25 West Main Street,
Belleville, Illinois 62220
234-8484

[C-20]

APPEAL TO THE SUPREME COURT OF ILLINOIS,
FROM THE CIRCUIT COURT
20TH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY, ILLINOIS

(January 9, 1970)

(Title Omitted in Printing)

NOTICE OF APPEAL

TO: VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, Illinois; MAURICE F. JOSEPH, as County Treasurer of St. Clair County; and County of St. Clair, Illinois

AND

ROBERT H. RICE, State's Attorney of St. Clair County; EUGENE H. WIDMAN, of Counsel; Room 310, Court House Annex, Belleville, Illinois.

You are hereby notified that John Schilb, individually and in a representative capacity for and on behalf of a class of persons, described in the complaint in the above entitled cause, hereby appeals to the Supreme Court of Illinois, from the judgment order entered in this cause on January 6, 1970, which said judgment order was final on the date of its entry, by dismissing plaintiff's complaint.

Said plaintiff-appellant hereby prays that said judgment order entered on January 6, 1970, be reversed and

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remanded to the trial court for a hearing on the accounting due from defendants.

Dated this 9th day of January, A.D. 1970.

SAM S. PESSIN,
Attorney for Plaintiff-Appellant.

Sam S. Pessin
Attorney at Law
25 West Main Street
Belleville, Illinois 62220
234-8484

[C-22]

(Jurat and Affidavit Omitted in Printing)

(Title Omitted in Printing)

[C-23]

APPEAL TO THE SUPREME COURT OF ILLINOIS,
FROM THE CIRCUIT COURT
20TH JUDICIAL CIRCUIT OF ILLINOIS
ST. CLAIR COUNTY, ILLINOIS
(January 9, 1970)

(Title Omitted in Printing)

NOTICE

TO: VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, Illinois; MAURICE F. JOSEPH, as County Treasurer of St. Clair County; and County of St. Clair, Illinois

AND

ROBERT H. RICE, State's Attorney of St. Clair County; EUGENE H. WIDMAN, of Counsel; Room 310, Court House Annex, Belleville, Illinois.

Please take notice that John Schilb, individually and in a representative capacity for and on behalf of a class of persons, described in the complaint in the above entitled cause, filed a Praecipe in the above cause on the 9th day of January, 1970, a copy of which is attached for your information.

SAM S. PESSIN,
Attorney for Plaintiff-Appellant
25 West Main Street
Belleville, Illinois 62220
234-8484

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APPEAL TO THE SUPREME COURT OF ILLINOIS,
FROM THE CIRCUIT COURT
20TH JUDICIAL CIRCUIT OF ILLINOIS,
ST. CLAIR COUNTY, ILLINOIS
(January 9, 1970)
(Title Omitted in Printing)

PRAECIPE FOR RECORD

John Schilb, individually and in a representative capacity, for and on behalf of a class of persons, described in the complaint in the above entitled cause, pursuant to Rule 322 of the Rules of the Supreme Court of Illinois, requests that the Clerk of the Circuit Court of the 20th Judicial Circuit, St. Clair County, Illinois incorporate in the Record of Appeal to the Supreme Court of Illinois, the following:

1. Complaint filed by plaintiff.

2. Summons showing service on defendants.

3. Answer of defendants.

4. Reply of Plaintiff, John Schilb, to defendants' answer.

5. Stipulation of facts entered into and filed by plaintiff and defendant.

6. Order of January 6, 1970, finding issues in favor of defendants, and dismissing plaintiff's complaint at plaintiff's costs.

[C-25]

7. All other pleadings, stipulations, orders and other matters filed in the trial court record prior to or subsequent to this Praecipe for Record.

8. Clerk's certificate of trial court record.

SAM S. PESSIN
Attorney for Plaintiff-Appellant

Sam S. Pessin
Attorney at Law
25 West Main Street
Belleville, Illinois 62220
234-8484

[C-26]

(Affidavit Omitted in Printing)

[C-27]

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT OF ST. CLAIR COUNTY, ILLINOIS

Date Filed: July 29, 1969

For Plaintiff:
Sam S. Pessin

(Title Omitted in Printing)

Date, 7-29-69; Court, $25.00; Library Fee, $1.00; Description, Filing Fee; Total Charged, $26.00; Cash Paid, $26.00.

The Court finds the issues in favor of the defendants and against plaintiff and, particularly, finds that Section 110.7 Sub-paragraph (f) of the Criminal Code proceedings is constitutional.

Wherefore, it is ordered that the Plaintiff's complaint be and is hereby dismissed at plaintiff's costs. Enter: J.W.G.

[C-28]

I, Vincent P. Kuebel, Clerk of the Circuit Court of St. Clair County, in the State aforesaid, do hereby certify that the above and foregoing is a true, full, perfect and complete copy of documents filed in a certain cause lately pending in said Court, on the Civil side thereof, wherein John Shilb, individually etc., Plaintiff, vs. Vincent P. Kuebel, etc., et al., Defendants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Belleville, this 1st day of June A.D. 1970.

VINCENT P. KUEBEL, Clerk.
CAROL SCHNUR, Deputy.

[2]

(Brief for Appellants Omitted in Printing.)
(Filed February 2, 1970.)

[3]

(Appellees' Brief Omitted in Printing.)
(Filed February 16, 1970.)

[4]

(Excerpts of Record Omitted in Printing.)
(Filed March 16, 1970.)

[5]

(Reply Brief Omitted in Printing.)
(Filed March 16, 1970.)

[6]

(Brief For Amicus Curiae Matthew J. Danaher, Clerk of the Circuit Court of Cook County and Edmund J. Kucharski, Treasurer of Cook County, Illinois Omitted in Printing.)
(Filed March 16, 1970.)

[7]

(Brief and Argument of Amicus Curiae, Frederick Douglas Andrews, Edward Crawford, Andrew Brown, Curlee Reed and Andrew Peden, Plaintiffs in the Circuit Court of Cook County, Illinois Omitted in Printing.)

(Filed April 10, 1970.)

[8]

Dissenting opinion of Mr. Justice Kluczynski filed December 3, 1970.

OPINION

(October 7, 1970)

Docket No. 42845—Agenda 47—March 1970.

JOHN SCHILB *et al.*, Appellants, *vs.* VINCENT P. KUEBEL, Circuit Clerk, *et al.*, Appellees.

Mr. JUSTICE BURT delivered the opinion of the court:

Plaintiffs appeal from an order of the circuit court of St. Clair County dismissing their complaint against defendants, clerk of the circuit court of St. Clair County, County Treasurer of St. Clair County and County of St. Clair in a class action wherein plaintiffs alleged that the cost retention provisions of section 110-7(f) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1963, ch. 38, par. 110-7(f) are unconstitutional, and sought recovery on behalf of all those who had been charged with and had paid bail bond costs under the statute in question in the circuit court of St. Clair County from and after the effective date of the act. The case involves substantial constitutional questions, giving this court jurisdiction on direct appeal.

The cause was submitted in the trial court on a stipulation of facts which we summarize here to the extent

necessary for purposes of this decision. The act in question was adopted on August 14, 1963. Since that time Vincent P. Kuebel, clerk of the circuit court of St. Clair County, and Maurice J. Joseph, treasurer of said county, and their predecessors in office, acting under the statutory provisions, have collected from plaintiff, John Schilb, and many other defendants in criminal actions, who were acquitted by trial courts of their respective charges, a sum equal to 10% of their respective deposits of bail security. These collections were made in good faith by these officials in accordance with their oaths of office as understood by them and under color of authority of the act. The exact account of all of said collections are present in the records of said offices and should be agreed upon by the parties for subsequent purposes in the event the court shall award the relief sought by plaintiffs.

On January 16, 1969, Schilb was arrested and charged with leaving the scene of an accident, on which he posted $50 cash bail security and obstructing traffic on which $25 cash bail was posted. He was found guilty of one charge and not guilty of the other. He was charged and paid, in addition to any fine, $5 and $2.50, or a total of $7.50 as cost charges for such bail. A large number of other defendants have paid the 10% bail charge required by the statute after being found guilty (whether by trial or on plea) or upon being found not guilty (either by trial or dismissal.) It was agreed that the essential questions of fact, as concerns the issue, are similar as to all defendants in all criminal cases in said circuit court, since the effective date of the act, who posted cash bail security, and that questions of law are similar in all such cases also as they pertain to the issues, particularly the claim of unconstitutional collection of bail bond costs

which is common to the interest of such defendants in criminal cases in said court.

The parties further agreed that there was a *bona fide* dispute between them brought without collusion; that it is impractical if not impossible to join all members of the class to which plaintiff belonged as parties; that this action would avoid undue and unnecessary multiplicity of actions and that plaintiff, Schilb, brings the action in a representative capacity for and on behalf of each member of the class whose interests are similar who would proportionately share in the expenses of the litigation.

In addition to including in their stipulation the entire provisions of section 110-7, the parties refer to section 110-8 (Ill. Rev. Stat. 1969, ch. 38, par. 110-8) and state that it provides in essence for depositing of cash, stocks or bonds in the full amount of bail or pledging interests in real estate in double the amount of bail fixed without payment of any fee and that actual costs of administering the provisions of sections 110-7 and 110-8 are substantially the same but that there may probably be a slightly higher cost attendant upon administering section 110-8.

Finally, the parties agreed that the amount of bail in each particular case is not fixed by the clerk or treasurer but by a judge whose discretion is not guided by statute, rule of court or any fixed standard; that various judges fix the amount of bail for the same types of offenses at various and divers amounts, without relationship as to guilt or innocence of the particular defendant and without relationship of the particular offense and the bail fixed.

Plaintiffs contend that the cost retention provision of section 110-7(f) of the Code of Criminal Procedure is

unconstitutional because it violates the equal-protection and due-process clauses of the fourteenth amendment to the Federal constitution and section 2 of arctile II of the constitution of Illinois. Specifically it is urged that the cost retention provision creates a discriminatory disparity within a homogeneous class; that it operates to create an unconstitutional disparity between the affluent and nonaffluent and that it is unconstitutional as creating a disparity among those obtaining release by the deposit of 10% of the amount of bail. Additionally it is claimed that the provision is illegal and void as in violation of section 19 of article II of the Illinois constitution because it amounts to requiring an assessment of costs against a discharged defendant. Defendants argue that these claims of unconstitutionality are without merit. They also suggest that there is no basis for the bringing of a class action under the facts here involved.

In 1963 the General Assembly enacted the Code of Criminal Procedure (Ill. Rev. Stat. 1963, ch. 38, pars. 100—1 *et seq.*) Among its comprehensive provisions are those of article 10 relative to bail in criminal cases. (Ill. Rev. Stat. 1963, ch. 38, par. 110-1 to 110-5 inclusive.) Section 110-2 provides for the release of an accused on his own recognizance where from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction. The statute imposes criminal sanctions for failure to appear as required as well as provisions for forfeiture and collection. (Ill. Rev. Stat. 1963, ch. 38, par. 110-2.) Section 110-7 represents a new departure in dealing with the problems of bail in this State. It provides that a person for whom bail has been set shall execute a bail bond and deposit with the clerk of the court a sum of money equal to 10%

of the bail upon the deposit of which he shall be released subject to the conditions of the bond which involve forfeiture of the full amount for nonappearance as well as the imposition of a criminal penalty. Section 110-7(f) provides for a return of 90% of the bail deposit when the conditions of the bond have been performed and the accused has been discharged from all obligations with the stipulation that the clerk shall retain as bail bond costs 10% of the amount deposited. (Ill. Rev. Stat. 1963, ch. 38, pars. 110-7(a), (b), (f).) The amount retained represents one percent of the amount of bail originally set by the court. Section 110-8 provides for a different type of procedure in posting bail from that prescribed in section 110-7. It provides that "in lieu" of the bail deposit provided for in section 110-7 any person for whom bail has been set may execute the bail bond with or without sureties, which bond may be secured by a deposit with the clerk of an amount equal to the bail, of cash, or stocks and bonds, or by real estate situated in this State with unencumbered equity not exempt, owned by the accused or sureties worth double the amount of bail set in the bond. (Ill. Rev. Stat. 1963, ch. 38, par. 110-8.) With the exception of certain changes not directly involved in the questions presented in this appeal the foregoing statutory provisions remain substantially the same at this time and the three alternative means or methods specified in article 110 constitute the only ways in which release on bail can be had in this State. See: Ill. Rev. Stat. 1969, ch. 38, pars. 110-2, 110-7, 110-8.

The above legislative enactments represent substantial reforms in bail practices in this State and came about only after extensive studies of certain evils inherent in our former system and a comparison with practices in the Federal courts and in other jurisdictions. (See Com-

mittee Comments, S.H.A., ch. 38, § 110-1 *et seq.* 298 *et seq.*) From this rather extensive and revealing discussion it appears that the central purpose of the legislature in enacting sections 110-7 and 110-8 was to severely restrict the activities of professional bail bondsmen who customarily collected 10% of the amount of a bond as a fee which was retained whether or not the conditions of the bond were met by the accused. The prevalence of this practice was noted in our opinion in *People ex rel. Gendron* v. *Ingram,* 34 Ill. 2d 623, 626, in which this court sustained the constitutionality of the 1965 amendment to section 110-15 of the Code of Criminal Procedure making sections 110-7 and 110-8 the exclusive means of posting bonds in criminal cases in this State. In short, as the Committee Comments show, the object of the statutes was to reduce the cost of liberty to arrested persons awaiting trial. One of the matters noted in connection with the former practice was that the pecuniary loss deterrent to jumping bail which was its central idea was simply not working in a system where payment of a bond premium was required without regard to performance of conditions. At the same time certain studies showed that, in spite of collecting a 10% fee, actual judgment on forfeitures paid by professional bondsmen amounted to only one per cent of the bonds written. It was reasoned, therefore, by those who studied the problem that a much fairer system would result if a plan such as that provided by section 110-7 were evolved with an accused, who has faithfully performed the conditions of his bond, retaining substantially the amount formerly pocketed by the professional bondsman while allowing to the courts a reasonable fee as bond costs for handling bail bonds and offsetting the monetary amount of any loss resulting from

the occasional bail jumper where the professional bondsman under the former system might have forfeited the amount of bail. Otherwise stated, the ultimate objective of this reform was to regain from professional bondsmen the control of bail releases and restore such control to the courts where it rightfully belongs. (See Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 Ill. L. Forum 35, 36-37.) As the author points out, the scheme devised in this State has since been copied in bills introduced in other States and in Congress. As finally adopted the bill passed by Congress eliminated the 10% retention of the cash deposit. (18 U.S.C. 3146(a)(3).) But New York's applicable legislation provides that cash, stocks and bonds may be deposited in lieu of bail and that a fee of two per cent for receiving, keeping and paying out the same may be charged. See: N.Y. Code of Criminal Procedure, vol. 66, sec. 586.

Plaintiffs' first point is that section 110-7(f) of the Code of Criminal Procedure is unconstitutional because it requires those seeking release under the provisions of section 110-7 to pay bond costs, whereas those who use either section 110-2 (recognizance) or section 110-8 (deposit of full amount in cash or securities or pledge of real estate in double the amount) are not required to pay any costs whatever. In this connection plaintiffs argue that all accused are *sui generis,* for each seeks pretrial release, and that to require payment of costs as a condition of pretrial freedom in the one case and not in the others constitutes an unconstitutional discrimination among the members of a homogenous class.

With respect to plaintiffs' position on unconstitutional classification it will be observed that it rests entirely upon the assumption that there is no basic or reasonable

difference between those obtaining release under sections 110-2, 110-7 and 110-8. It is said that all are accused of crime and seek release from pretrial custody and that the difference in their treatment relative to cost is a violation of fundamental concepts of equal protection and due process. In other words, the argument is that because the result of release is sought in each case there is but one class of persons who must be treated alike. However, though the end result may be release in all cases, whatever course may be followed, it must be apparent, we believe, that the means by which release is sought is entirely different in each of the sections of the statute in question. This is not only factually so but historically the legislative approach to the problems presented was to design the different sections of the statute to meet specific separate problems. (See Committee Comments, S.H.A., ch. 38, § 110-1 *et seq.* p. 298 *et seq.*) Thus section 110-2 providing for release on the accused's own recognizance was designed to meet a condition revealed by factual studies which proved that the great majority of persons released on bail have no intention of violating bail and will appear for trial. The studies further developed a second premise, that to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Section 110-7 (deposit of 10% of the amount fixed for bail with a return of 90% of the deposit on performance of conditions) was designed specifically to fulfill the needs shown by the second premise and curtail the activities of the professional bondsman. This section, by its wording, is obviously designed as the principal method to be used in giving bail. Section 110-8 provides for a method which may be used in "lieu of the bail deposit

provided for in section 110-7" and, according to the comment, is designed primarily to meet the need of a method of posting relatively small amounts of cash bail in traffic cases and the like. It is stated in the above reference at p. 324: "It should always be kept in mind, however, that section 110-7 provides for one type of procedure in posting bail, section 110-8 another."

It appears that the legislature did not consider itself as dealing with a single problem—*i.e.*, a provision of procedures for those entitled to bail generally. Instead it regarded situations possibly giving rise to separate needs and sought to accommodate those requirements. As to section 110-7, as already related, it sought to reduce the cost of bail and the high incidence of "bail gouging" by providing a method whereby any citizen accused of crime might have his liberty pending trial with a minimum of cost. On the other hand, it was careful to recognize and protect the rights of those who could and should be released upon their own recognizance within the limits of judicial discretion without any bond cost whatever. In none of the provisions in question is release conditioned upon the payment of bail costs in advance nor can payment of the one percent fee ultimately deducted under section 110-7(f) be considered a condition precedent to the selection of section 110-7 as the method of acquiring release. The only condition precedent to release under the provisions of section 110-7 is the payment of 10% of the amount of bail as fixed by the court, and plaintiffs disclaim any thought of questioning the constitutionality of that requirement, for they say that the sole question before the court is the constitutionality of subparagraph (f) of section 110-7. Further, they say: "The plaintiffs herein wish to make it eminently clear that they do not

in any manner fault the principles of Article 110 of the Illinois Code, they do however, take exception to the cost provision of Section 110-7(f) which is patently unconstitutional." The ultimate question on this portion of the case is, therefore, whether the provisions of subsection (f) of section 110-7 are fatal to an otherwise admittedly valid legislative classification as provided in the three sections in question and particularly that of section 110-7.

This court has held that the test whether a legislative act affords equal protection to all persons affected by it is "whether the legislative enactment requires the same means and methods to be employed alike by the persons composing the class affected so that the law operates uniformly on all persons similarly situated." (*Reif* v. *Barrett*, 355 Ill. 104, 121.) Where a law affects all members of the same class alike it is not objectionable as constituting class legislation. (*Smith* v. *Hill*, 12 Ill. 2d 588, 598.) Under article 10 of the Code of Criminal Procedure as presently enacted those entitled to bail have a choice of three mehods to be used in securing release, and the choice is entirely voluntary and without compulsion. Those who elect to secure release by the deposit of 10% of the amount of bail under the provisions of section 110-7 constitute a separate class under the legislative plan and purpose as already indicated. They are not automatically placed in this class or category by the law. They join only by the exercise of their own volition. Presumably they know that the amount deposited will be subject to deduction and we know of no law or constitutional provision which would preclude their being required to pay a reasonable amount for the privilege extended to those who elect to come into this class. The requirement of a fee to help defray the cost of adminis-

trative services in the courts is a traditional and basic concept recognized as valid by this court. See: *People ex rel. Flanagan* v. *McDonough;* 24 Ill. 2d 178, 180-181.

Plaintiffs also contend that the cost retention provision of section 110-7(f) creates an unconstitutional disparity between the affluent and nonaffluent. It is said for a supposed example that accused "A" availing himself of section 110-8 deposits the full amount of bond and pays no cost, whereas accused "B", lacking sufficient property, obtains his release by depositing 10% of the full amount of bond under section 110-7 and is assessed a cost. It is argued that accused "B" is thus assessed a cost merely because his lack of affluence makes him unable to obtain his release by depositing the full amount under the provisions of section 110-8. Without stating any factual source, plaintiffs further state that "a considerable percentage of individuals, like accused 'B' have *no choice* but to seek release on their own recognizance under Section 110-2 or the 10% provision of Section 110-7" because they have neither cash nor real estate in sufficient amount to post the full amount of their bail. These are said to be "poor men" who should not be discriminated against due to their lack of wealth. Plaintiffs say that if the size of a deposit for bail is the distinguishing factor which rendered this group different from those who deposit the full amount of bail, there is an unconstitutional differentiation which is not cognizable in law and creates a disparity based on wealth. In support of their position plaintiffs cite a number of cases such as *Griffin* v. *Illinois,* 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, establishing the general proposition that the individual cannot be penalized in his quest for justice due to lack of wealth. Defendants concede the validity of this principle

but deny that it is applicable under the facts presented here.

The difficulty with plaintiffs' position is that it is based primarily on the assumption that a majority or at least "a large percentage" of those seeking bail would prefer to elect to proceed under section 110-8 but lack the financial means to do so and are therefore forced against their wills to ask for bail under section 110-7 by posting the deposit. We find no support for this assumption in any of the stipulated facts. As we view the situation it is just as reasonable to assume that most of those eligible would elect to perfect bail under section 110-7 because of the convenience it affords and the very small cost of only one percent actually involved. Proceedings under section 110-8 necessarily involve tying up money and property for an indefinite period. In the case of a large bond the amount pledged would be in proportion and the consequent economic loss through deprivation of the opportunity to invest these funds could be considerable. It is reasonable to suppose, therefore, that even the relatively affluent would prefer to make bail under section 110-7. In any event we do not believe it can reasonably be said that choice between the means to be used is necessarily dictated by wealth or lack of wealth of the accused.

Whether questions of classification are involved the reasons justifying the classification need not appear on the face of the statute and the classification will be upheld if any state of facts can reasonably be conceived to sustain it. The burden therefore rests upon one who assails the statute to negate the existence of such facts. (*Thorpe* v. *Mahin,* 43 Ill. 2d 36, 45; *Department of Revenue* v. *Warren Petroleum Corp.,* 2 Ill. 2d 483, 489-490.)

As already indicated, we believe that facts can reasonably be conceived to sustain the legislation here involved as against plaintiffs' argument that there is necessarily a discrimination based on wealth. We find nothing in plaintiffs' argument which reasonably tends to negate the existence of those facts and certainly there is nothing by way of concrete evidence which does so.

As to plaintiffs' argument that the cost retention provision of section 110-7(f) creates a disparity among those obtaining release by the deposit of 10% of the amount of bail, it is said that accused "A" whose bond is set at $10,000 must deposit $1,000 and that upon fulfillment of conditions he receives a refund of $900 with the result that he has paid a cost of $100. "B" on the other hand, whose bond is fixed at only $1,000, deposits $100 and receives a refund of $90 resulting in a cost of only $10. It is claimed that there is no rational basis for this difference. While the dollar amount in the supposed cases is different, each has paid an amount equal to one percent of his bail and therefore there is payment of the same proportionate amount in each case. Plaintiffs present no authority which sustains the proposition that enacting a charge in the same proportion in such cases involves unconstitutional discrimination and we know of no authority which would support this claim. Historically many fees and charges for the service of court officers have been fixed in proportion to the amount involved. As far as we know there has been no suggestion of unconstitutional action in such cases as long as all persons similarly situated are charged in the same proportion and at the same rate. Flat rates are also found in the field of taxation, as defendants suggest, including income taxes, retailers' occupation taxes, real-estate taxes, use

taxes, and inheritance and transfer taxes. The constitutionality of these enactments has been repeatedly sustained by the courts.

Finally, there is the contention that the cost provision of section 107-7(f) is illegal and void because it amounts to an assessment of court costs against a discharged defendant. Plaintiffs cite *Wells* v. *McCullock*, 13 Ill. 606, and *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, on this point. *Wells* involves an attempt to impose on an acquitted defendant court costs he has made in his defense. The court, relying largely upon the provisions of the statute relative to disposition of the question of costs in such cases, held that the defendant was not liable for their payment. In *Giaccio* the validity of a Pennsylvania statute authorizing the jury to impose the costs of a criminal prosecution on an acquitted defendant in a misdemeanor case was in question. The court held the statute unconstitutional on the ground of vagueness and the absence of any standards sufficient to enable a defendant to protect himself against arbitrary and discriminatory imposition of costs by a jury. But it did not say that the imposition of such costs would be unconstitutional in any event. However, whatever the rule might be as to the imposition of court costs on an acquitted or discharged defendant, it has no application here. The payment of costs for prosecution is governed by an entirely different statute from that dealing with costs charged for the administration of bail bonds. The statute concerning the latter, as already observed, is section 110-7 of the Code of Criminal Procedure. Costs of prosecution in criminal cases are provided for in section 180-3 of the Code of Criminal Procedure as follows: "When any person is convicted of an offense under any statute, or at

common law, the court shall give judgment that the offender pay the costs of the prosecution." (Ill. Rev. Stat. 1969, ch. 38, par. 180-3.) This statute obviously refers only to court costs and has no reference to bond costs which are chargeable regardless of what subsequently occurs in the prosecution of the case and regardless of the guilt or innocence of the accused. It may be conceded that court costs sustained in his defense may not properly be assessed against an accused who has won his discharge or acquittal but that has no bearing whatever on bond costs and the retention of a percentage of such costs is not tantamount to the assessment of court costs against a discharged defendant.

In conclusion we find that the classifications provided for in the statutes here involved bear a reasonable relation to the objects sought to be accomplished and are uniform as to all members of a particular class sought to be affected. No unconstitutional discrimination is involved and the legislative enactments are not in violation of fundamental concepts of due process or equal protection of the law. Since the conclusion we have reached favors constitutionality it becomes unnecessary to discuss the other question raised, *i.e.*, the propriety of a class action.

The judgment of the circuit court of St. Clair County is affirmed.

Judgment affirmed.

Mr. JUSTICE KLUCZYNSKI, dissenting:

I cannot agree with the conclusions of the majority opinion.

Through *Griffin* v. *Illinois,* 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, and its progeny, it has become well established that the equal-protection and due-process

clauses of the fourteenth amendment require that a defendant not be penalized in a criminal proceeding due to a lack of wealth. I believe that this type of penalty exists in the treatment of various defendants under sections 110-7 and 110-8 of the Code of Criminal Procedure. A disparity of treatment results because under 110-7 the clerk retains 10% of the bail deposit as a cost whereas under 110-8 or 110-2, no costs are involved. It is discriminatory in that some defendants cannot voluntarily choose under which bail provision they will be released. The defendant who, because of lack of wealth, cannot meet the requirements of 110-8 and who cannot qualify for release under 110-2, is forced to seek relief under 110-7, the only section which involves a cost. The majority would have us believe that there are no nonaffluent defendants or that if given the choice most defendants would choose section 110-7 for economic reasons. This court must take judicial notice of the fact that many defendants cannot afford to pay the full amount of the bail. Plaintiff has cited many authorities (Bail Reform Act of 1966, 18 U.S.C. 3141-3152; Congressional Record, vol. 112 Con. Rec. 89th Congress, Second Session pp. 12488-12504; S.H.A. ch. 38, art. 110, Committee Comments, p. 298; Attorney General's Committee on Poverty and the Administration of Criminal Judicial Procedure, U.S.C. Cong. and Admin. News 1966; National Conference on Bail and Criminal Justice, May 27, 1964) for the proposition that as the amount of bail increases, the percentage of defendants who can pay the full amount of the bail decreases. In addition, the Committee Comments (S.H.A. ch. 38, art. 110, at p. 300) state that section 110-8 is an alternative to 110-7 for "those who have the means." Once it is established that certain defendants are not financially able to proceed under section 110-8, it is no longer significant

that most or all defendants would elect to proceed under section 110-7. The important consideration is not what section they would elect, but rather whether every defendant has a choice of the two sections. Realizing that certain defendants have no choice but to pay a cost under 110-7, while other financially able defendants can elect to pay nothing under 110-8, I must find that the sections in question deny equal protection and due process.

Further, in *Giaccio* v. *Pennsylvaia,* 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, the United States Supreme Court considered the question whether a defendant may be punished after finding him not guilty. The concurring opinion specifically found: "* * * the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." (382 U.S. at 405.) This same concept has been recognized in Illinois in our constitution, case law, and legislative enactment. Section 19 of article II of the Illinois constitution provides that every person "ought to obtain, by law, right and justice freely, and without being obliged to purchase it, * * *." Any defendant who is forced through economic circumstances to proceed under section 110-7 is "obliged" to pay costs for his constitutional right to pretrial liberty in violation of this provision.

This court, in *Wells* v. *McCullock,* 13 Ill. 606, held that a party who is indicted under the Criminal Code, and is acquitted, is not liable for costs. While it is true that the case involved the interpretation of a statute then in effect, a statute similar to it is presently in effect. (Ill. Rev. Stat. 1963, ch. 53, par. 32.) The court in *Wells* found that "An acquittal, or other legal discharge, ab-

solves the defendant from the payment of *all* costs." (Emphasis added.) (13 Ill. at 608.) Any cost, whether it be termed court cost or administrative cost, is an expense in a criminal defense, and if the defendant is acquitted, imposing such a cost, in my opinion, violates the due-process clause and section 19 of article II of the Illinois constitution.

Mr. JUSTICE SCHAEFER joins in this dissent.

[9]

(October 7, 1970)

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
SUPREME COURT) ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the fourteenth day of September in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, Chief Justice
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice CASWELL J. CREBS
Justice THOMAS E. KLUCZYNSKI
Justice JOHN T. CULBERTSON, JR.
Justice MARVIN F. BURT
WILLIAM J. SCOTT, Attorney General
ROBERT G. MILEY, Marshal
Attest: JUSTIN TAFT, Clerk

BE IT REMEMBERED, that, to-wit: on the 7th day of October, A.D. 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

John Schilb individually and in a representative capacity for and on behalf of each member of a class of persons who have since August 14, 1963 been, or who have hereafter been; (a) named in a criminal proceeding in the Circuit Court of St. Clair County, Illinois, or any Department or Division thereof; (b) required to post a deposit of bail security and was acquitted by the trial court, and; (c) who was required to pay as bail bond costs, 10% of the bail security, said person had deposited, under an act in relation to the deposit of bail security approved August 14, 1963,

Appellant

No. 42845

vs.

Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County; Maurice F. Joseph, as County Treasurer of St. Clair County, and County of St. Clair, Illinois,

Appellees.

Appeal from Circuit Court St. Clair County CIV 69-1455

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning

the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of St. Clair County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this — day of ————————.

Clerk,

Supreme Court of the State of Illinois.

[10]

(Petition for Rehearing Omitted in Printing.)

[11]

(December 3, 1970)

UNITED STATES OF AMERICA

STATE OF ILLINOIS }
SUPREME COURT } ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the ninth day of November in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, Chief Justice
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice CASWELL J. CREBS
Justice THOMAS E. KLUCZYNSKI
Justice JOHN T. CULBERTSON, JR.
Justice MARVIN F. BURT
WILLIAM J. SCOTT, Attorney General
ROBERT G. MILEY, Marshal
Attest: JUSTIN TAFT, Clerk

BE IT REMEMBERED, that, to-wit: on the 3rd day of December, A.D. 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

JOHN SCHILB, Indv., etc.,
Appellant

No. 42845

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County; et al., etc.,
Appellees.

Appeal from Circuit Court St. Clair County

And now, on this day, the Court having duly considered the petition for rehearing filed herein, and being

now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.

[12]

(Notice, Motion for Reconsideration and Suggestions Filed December 10, 1970, Omitted in Printing)

[13]

(January 14, 1971)

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
SUPREME COURT) ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eleventh day of January in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: Robert C. Underwood, *Chief Justice*
Justice Walter V. Schaefer
Justice Daniel P. Ward
Justice Joseph H. Goldenhersh
Justice Thomas E. Kluczynski
Justice Charles H. Davis
Justice Howard C. Ryan
William J. Scott, Attorney General
Robert G. Miley, Marshal
Attest: Justin Taft, Clerk

BE IT REMEMBERED, that, to-wit: on the 14th day of January, A.D. 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

JOHN SCHILB, Indv., etc.,
Appellant

No. 42845

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County; et al., etc.,
Appellees.

Appeal from Circuit Court St. Clair County

And now, on this day, the Court having duly considered the motion by appellant for reconsideration of the order denying petition for rehearing, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant for reconsideration of the order denying petition for rehearing be, and the same is, denied.

[14]

(Motion, Notice, Affidavit for Stay of Mandate, Filed January 22, 1971, Omitted in Printing)

[15]

(January 26, 1971)

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
SUPREME COURT) ss.

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eleventh day of January in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.

Present: ROBERT C. UNDERWOOD, *Chief Justice*
Justice WALTER V. SCHAEFER
Justice DANIEL P. WARD
Justice JOSEPH H. GOLDENHERSH
Justice THOMAS E. KLUCZYNSKI
Justice CHARLES H. DAVIS
Justice HOWARD C. RYAN
WILLIAM J. SCOTT, Attorney General
ROBERT G. MILEY, Marshal
Attest: JUSTIN TAFT, Clerk

BE IT REMEMBERED, that, to-wit: on the 26th day of January, A.D. 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

JOHN SCHILB, Indv., etc.,
Appellant

No. 42845

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County; et al., etc.,
Appellees.

Appeal from Circuit Court St. Clair County

And now, on this day, the Court having duly considered the motion by appellant for stay of mandate pending filing and disposition of an appeal to the United States Supreme Court, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant for stay of mandate pending filing and disposition of an appeal to the United States Supreme Court be, and the same is, allowed.

[16]

No. 42845

(Feb. 12, 1971)

IN THE

SUPREME COURT OF ILLINOIS

(Title omitted in Printing)

NOTICE OF APPEAL
TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that John Schilb, individually and in a representative capacity for and on behalf of each member of a class of persons who have since August 14, 1963 been, or who have hereafter been, (a) named as a defendant in a criminal action in the Circuit Court of St. Clair County, (b) required to file a deposit of bail security, and (c) required after trial, dismissal or acquittal to pay a sum equal to 10% of the bail security deposited, plaintiffs-appellants, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Illinois, affirming the decision of the Circuit Court of St. Clair County, Illinois, Twentieth Judicial Circuit, entered in this proceeding on October 7, 1970, and the subsequent denial of the Petition for Rehearing on December 3, 1970.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

SAM S. PESSIN
25 West Main Street
Belleville, Illinois 62220
CORNELIUS F. DORE
One North LaSalle Street

Chicago, Illinois 60602
JOHN J. O'TOOLE
111 West Washington Street
Chicago, Illinois 60602
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69 West Washington Street
Chicago, Illinois 60602

Attorneys for Plaintiffs-Appellants.

STATE OF ILLINOIS)
COUNTY OF COOK) ss.

AFFIDAVIT

I, John J. O'Toole, one of the attorneys for the plaintiffs-appellants, and a member of the Bar of the Supreme Court of the United States, hereby certifies that on the 11th day of February, 1971, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. Vincent P. Kuebel, etc., et al., defendants-appellees, by mailing a copy in a duly addressed envelope with first class postage prepaid, to the attorney of record, as follows:

To: Robert H. Rice
States Attorney for St. Clair County
Court House Building, Public Square
Belleville, Illinois
Attorney for Defendants-Appellees.

2. Matthew J. Danaher, etc., et al., *Amicus Curiae,* by mailing a copy in a duly addressed envelope with first

class postage prepaid, to their attorney of record, as follows:

To: Edward V. Hanrahan

States Attorney for Cook County
500 Civic Center
Chicago, Illinois 60602

JOHN J. O'TOOLE.

Subscribed and sworn to before me this 11th day of February, 1971.

_____

Notary Public

[17]

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
SUPREME COURT) ss.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify the foregoing to be a true copy of the record of this Court in a certain cause entitled:

John Schilb individually and in a representative capacity for and on behalf of each member of a class of persons who have since August 14, 1963 been, or who have hereafter been; (a) named in a criminal proceeding in the Circuit Court of St. Clair County, Illinois, or any Department or Division thereof; (b) required to post a deposit of bail security and was acquitted by the trial court, and; (c) who was required to pay as bail bond costs, 10% of the bail security, said person had deposited, under an act in relation to the deposit of bail security approved August 14, 1963,

Appellant

No. 42845

vs.

Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County; Maurice F. Joseph, as County Treasurer of St. Clair County, and County of St. Clair, Illinois,

Appellees.

Appeal from
Circuit Court
St. Clair County
CIV 69-1455

Filed in this office on the 14th day of January A.D. 1970.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 17th day of February, 1971.

JUSTIN TAFT, Clerk,
Supreme Court of the State of Illinois.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 1 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-90

No. ~~1412~~

JOHN SCHILB, et al.,
Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,
Defendants-Appellees.

On appeal from the Supreme Court of the State of Illinois

JURISDICTIONAL STATEMENT

SAM S. PESSIN,
25 Main Street,
Belleville, Illinois 62220.

JOHN J. O'TOOLE,
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KEENAN PRINTING COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. —

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

VS.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

On appeal from the Supreme Court of the State of Illinois

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Illinois which held the bail cost retention provision of the Illinois Criminal Code [Ill. Rev. Stat. 1963 etc. Cp. 38, Par. 110-7(f)] valid and not in contravention of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States.

OPINIONS BELOW

The majority opinion of the Supreme Court of Illinois was filed on October 7, 1970, with the dissent of Mr. Justice Thomas E. Kluczynski and Mr. Justice Walter V. Schaefer noted (App. A, p. 1).

On December 3, 1970 the written dissenting opinion was filed (App. B, p. 16) and appellant's Petition for Rehearing was denied (App. C, p. 19).

The majority and dissenting opinions are reported at 46 Ill. 2d 538 and 264 N.E. 2d 377.

JURISDICTION

This action was instituted by John Schilb, individually and for all others similarly situate, who were charged bail costs under Sec. 110-7(f) of the Illinois Criminal Code [Ill. Rev. Stat. 1963 etc. Cp. 38, Par. 110-7(f)] (App. D, p. 23).

The complaint sought a declaratory judgment that Sec. 110-7(f) violates the Equal Protection of the Laws and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States (Rec. Ex. C-5). The Circuit Court of St. Clair County, Illinois, specifically held Sec. 110-7(f) of the Illinois Criminal Code constitutional (Rec. Ex. C-18). An appeal was taken to the Supreme Court of the State of Illinois which on October 7, 1970, affirmed the decision of the trial court (App. A, p. 1).

A Petition for Rehearing was filed and thereafter, on December 3, 1970, the Petition was denied (App. C, p. 19) and the dissenting opinion of Mr. Justice Thomas E. Kluczynski and Mr. Justice Walter V. Schaefer filed (App. B, p. 16). A Motion for Reconsideration of the denial of

the Petition for Rehearing was denied on January 14, 1971 (Rec. 13).

The Notice of Appeal to the Supreme Court of the United States was filed on February 12, 1971 (Rec. 16).

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois by appeal is conferred by 28 U.S.C. 1257(2) and sustained by *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966); *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966).

STAUTE INVOLVED

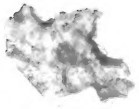
This cause involves the constitutionality of the bail cost retention provision of Section 110-7(f) of Art. 110 of the Illinois Criminal Code [Ill. Rev. Stat. 1963 etc. Cp. 38, Par. 110-1 *et seq.*] (App. D, pp. 20-29).

QUESTIONS PRESENTED

The following questions relating to the Due Process and Equal Protection of the Law Clauses of the Fourteenth Amendment to the Constitution of the United States are presented by this appeal:

1. May a State impose a bail cost on only one segment of a class seeking pretrial release without contravening the decision of this Court in *Rinaldi* v. *Yeager,* 384 U.S. 305, 308 (1966)?

2. May a State impose bail costs on the poor and non-affluent while imposing no such costs on the rich and affluent, without contravening the spirit and principles of *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Bandy* v. *U.S.,* 81 S. Ct. 197 (1960); and the Federal Bail Reform Act of 1966 (18, U.S.C., 3141-3152)?



3. May a State impose a bail cost on a person found innocent of a criminal charge without violating the spirit of *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966); and, the Federal Bail Reform Act of 1966, (18, U.S.C., 3141-3152?

STATEMENT OF THE CASE

The 73rd General Assembly of the State of Illinois revised its statutory bail procedures by enacting Article 110 of the Illinois Criminal Code [Ill. Rev. Stat. 1963, Cp. 38, Par. 110-1 *et seq.*] (App. D, pp. 20-29).

Article 110 provides for the pretrial release of a criminally accused in one of three ways: his own recognizance (Section 110-2) (App. D, p. 20); deposit of 10% of the full amount of bail (Section 110-7) (App. D, pp. 22-24); or, deposit of cash, stocks or bonds in the full amount of bail, or pledging real estate in double the amount of bail (Section 110-8) (App. D, pp. 24-27).

This statute further provides for the imposition of a bail cost on those released on deposit of 10% of bail [Section 110-7(f)] (App. D, p. 23). Conversely, under either release on recognizance (Section 110-2) or on the deposit of the full amount of bail (Section 110-8) *no costs are imposed.*

On July 29, 1969, John Schilb individually and on behalf of all others similarly situate, as a class, filed a Complaint in Chancery alleging that the bail cost retention provision of Section 110-7(f) of the Illinois Criminal Code "* * * is unconstitutional and deprives said defendants (in criminal proceedings) of their property without due process of the law, and in violation of equal protection of the laws contrary to the 14th Amendment to the Constitution of the United States * * *" (Rec. 1, C. 5).

The States Attorney of St. Clair County specifically de-

nied the aforementioned allegation in his answer (Rec. 1, C. 11). Trial briefs were filed and the Federal Constitutional questions were raised therein.

The Circuit Court of St. Clair County on July 6, 1970 found the issues against the plaintiffs, and "particularly finds Section 110-7, Subparagraph (f) of the Criminal Code proceedings is constitutional" (Rec. 1, C. 18).

An appeal was taken directly to the Supreme Court of Illinois for as the opinion states: "The case involves substantial constitutional questions, giving this Court jurisdiction on direct appeal" (App. A, p. 1).

The Federal Constitutional questions were raised in the Supreme Court of Illinois in the Appellants Brief (Rec. 2, p. 2); contested in the Briefs filed for the defendants (Rec. 3), and for *Amicus Curiae* (Rec. 6); and, reiterated in the Reply Brief, (Rec. 5), Oral Argument, Petition for Rehearing (Rec. 10) and Motion for Reconsideration of the denial of the Petition for Rehearing (Rec. 12).

These Federal Constitutional issues were noted in the Opinion of the Supreme Court of the State of Illinois (App. A, p. 3):

> "Plaintiffs contended that the cost retention provision of Section 110-7(f) of the Code of Criminal Procedure is unconstitutional because it violates the equal protection and due process clauses of the Fourteenth Amendment to the Federal Constitution: * * *"

and the Court specifically ruled (App. A, pp. 14, 15):

> "No unconstitutional discrimination is involved and the legislative enactments are not in violation of fundamental concepts of due process or equal protection of the law."

THE FEDERAL QUESTIONS PRESENTED ARE SUBSTANTIAL

The Federal constitutional questions presented in this appeal are substantial and require the plenary consideration of this Honorable Court.

THE ISSUES PRESENTED ARE OF TIMELY AND NATIONAL IMPORTANCE

In recent years there has been much disenchantment with the inequalities of the bail system on both Federal and State levels.

In 1963, the 73rd General Assembly of the State of Illinois revised its bail proceedings by enacting Article 110 of the Illinois Criminal Code (Ill. Rev. Stat. 1963, Cp. 38, Par. 110-1 et seq.) (App. D, pp. 20-29), which provides for the pretrial release of a criminally accused:

1. On his own recognizance (Sec. 110-2 (App. D, p. 20);

2. Deposit of 10% of the full amount of bail (Sec. 110-7) (App. D, pp. 22-24);

3. Deposit of cash, stocks or bonds in the full amount of bail, or pledging real estate in double the amount of bail (Sec. 110-8) (App. D, pp. 24-27).

Section 110-7 (f) (App. A, p. 23) of the statute imposes a bail cost upon those released under Section 110-7—but imposes no costs upon those released under Sections 110-2 or 110-8.

Similarly, Senate bills 2838, 2839, 2840 were introduced into the 88th Congress which were a Federal counterpart of Article 110. As in Illinois, Senate Bill 2840 (App. E, pp. 30-32) sought to impose a bail cost on those deposit-

ing 10% of bail. These bills died in Committee; however, the substance thereof was resubmitted in the 89th Congress as Senate Bill 1357 (Federal Bail Reform Act of 1966)—with one major exception—S. 1357 removed the bail cost provision on those depositing 10% of bail. Thus, under Federal procedure no bail costs are imposed on any segment of the class seeking pretrial release [18 U.S.C. 3146(a)(3)].

Subsequent to the enactment of the two foregoing statutes, several of the States enacted provisions permitting cash deposits and release upon recognizance. Significantly three states have enacted 10% deposit provisions similar to Section 110-7 and 18 U.S.C. 3146(a)(3).

Two of these states, Alaska[1] and Iowa[2], properly followed the Federal Act and impose no cost on any segment of the class gaining pretrial freedom. However, last July, Wisconsin[3] followed Illinois, in part, by imposing a bail cost on those depositing 10% who were found guilty —but properly imposed no cost on the acquitted or discharged.

It is submitted that because of the pressing necessity of bail reform, other states are enacting, or will enact, progressive bail legislation. If the decision of the Supreme Court of Illinois is permitted to stand, it will serve as precedent and inducement for states to impose unconstitutional bail costs upon the citizens of the United States.

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1. Section 12.30.020 of Code of Criminal Procedure (Alaska Stat. Ann. Cp. 30, Section 12.30.020).

2 Section 763.16 of Bail (Iowa Code Ann. 1967, Section 763.16).

3. Sections 969.02 and 969.03 of Criminal Procedure (Wisconsin Stat. Ann. 1970, Ch. 969, Pars. 969.02-03).

I.

THE IMPOSITION OF A BAIL COST ON ONLY ONE SEGMENT OF A CLASS SEEKING PRE-TRIAL RELEASE IS IN CONTRAVENTION OF THE DECISION OF THIS COURT IN RINALDI V. YEAGER, 384, U.S. 305, 308 (1966).

Article 110 of the Illinois Criminal Code provides for pretrial release upon an individual's recognizance (Sec. 110-2); deposit of 10% of bail (Sec. 110-7); or, deposit of full bail (Sec. 110-8).

All form a class to whom services are rendered by the Clerk of the Court (App. A, p. 3). Yet, a bail cost is imposed only on those released by depositing 10% of full bail—with the ultimate result that one segment bears the burden of defraying the administration of all bail bonds.

Appellants submit that the aforementioned imposition of costs on this one segment of the class is in direct conflict and indistinguishable from the decision of this Court in *Rinaldi* v. *Yeager,* 384 U.S. 305, 308 (1966).

In *Rinaldi,* New Jersey, by statute, afforded all unable to procure a transcript of their criminal trials, a free transcript for the purpose of appeal. However, it went one step further and provided that one incarcerated in the penitentiary after the affirmance of his conviction was required to repay the cost of the transcript. No corresponding charge was imposed on parolees, probationers, or those given a suspended sentence.

In the Opinion by Mr. Justice Stewart, expressing the view of 8 members of the Court, it was held (p. 308) that a statute imposing costs on only one segment of a class is in violation of the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States.

Section 110-7(f) of Illinois Criminal Code is equally unconstitutional for it imposes a cost on only one segment of the class afforded a service by the Clerk of the Court.

II.

THE IMPOSITION OF BAIL COSTS ON THE POOR AND NON AFFLUENT WHILE NO SUCH COSTS ARE IMPOSED ON THE RICH AND AFFLUENT IS IN DIRECT CONTRAVENTION OF THE SPIRIT AND PRINCIPLES OF GRIFFIN V. ILLINOIS, 351, U.S. 12 (1956), AND THE FEDERAL BAIL REFORM ACT OF 1966.

This Court has consistently held that a person cannot be penalized in a quest for justice due to a lack of wealth. *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *Green,* 363 U.S. 192 (1960); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *California,* 372 U.S. 353 (1963); *Coppedge* v. *U.S.* 369 U.S. 438 (1962); and, *Malani* v. *Illinois,* 386 U.S. 12 (1967).

In relation to the *Griffin* doctrine, Mr. Justice Douglas in *Bandy* v. *U.S.,* 81 S. Ct., 197 (1960) (bail application) made it eminently clear that when discussing "rich man —poor man," the poor man is not necessarily destitute, but rather, a man without "enough property to pledge for his freedom".

Poverty, therfore, in relation to bail, is merely whether one possesses sufficient assets to meet the bond set by the Court.

It has been established that as the amount of bail increases the percentage of those able to obtain pretrial release significantly decreases (Hearing before Committee on Judiciary, U.S. Senate, 88th Congress, 2d Session, S. 2838, S. 2839, and S. 2840, Aug. 4-6, 1964, pg. 364-Statistics). As Mr. Justice Thomas E. Kluczynski and Mr. Justice Walter V. Schaefer, in their dissent in the instant case stated: (App. B, p. 16); "This Court must take judicial notice of the fact many defendants cannot afford to pay the full amount of bail." Accord.[4]

It was this concept that led to the passage of the Federal Bail Reform Act of 1966, and Article 110 of the Illinois Criminal Code. These statutory provisions enable those unable to afford the full amount of bail to exercise their constitutional right to pretrial freedom [*Stack* v. *Boyle*, 342 U.S. 1 (1951)], by depositing 10% of the full amount of bail.

Since many defendants in criminal cases lack "enough property" to deposit the full amount of bail, they have *no choice* but to deposit 10% or remain incarcerated and suffer the pitfalls attendant thereto. *Bandy* v. *U.S.*, 81 S. Ct. 197 (1960).

Upon these non-affluent, Illinois *imposes a bail cost* (Section 110-7). No such cost is imposed by the Federal Act [18 U.S.C. 3146(a)(3)]. In addition, Illinois *imposes no bail costs* on the rich or affluent who can afford the

---

4. Bail Reform Act of 1966 (18 U.S.C. 3141-3152); Congressional Record (Vol. 112 Con. Rec. 89th Congress, Second Session pp. 12488-12504); S.H.A. Ch. 38, Sec. 110, Committee Comments; Attorney General's Committee on Poverty and the Administration of Criminal Judicial Procedure (U.S.C. Cong. and Admin. News 1966); National Conference on Bail and Criminal Justice, May 27, 1964.

full amount of bail (Section 110-8). Thus, those least able to afford it, the poor and non-affluent, who have *no choice* but to remain in jail or deposit 10% of bail, are unconstitutionally "penalized in a quest for justice due to a lack of wealth". *Griffin* v. *Illinois,* 351 U.S. 12, (1956).

III.

THE IMPOSITION OF A BAIL COST ON AN ACCUSED FOUND INNOCENT OF A CRIME VIOLATES THE SPIRIT OF GIACCIO V. PENNSYLVANIA, 382 U.S. 399 (1966).

There is an additional aspect of the bail cost provision of Section 110-7(f), which is legally and socially shocking. An innocent person accused of a crime, put to the expense and anguish of a trial, and then discharged, is assessed a cost for exercising his constitutional right to release pending trial.

In *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), Mr. Justice Stewart and Mr. Justice Fortas, in concurring opinions (p. 451-2), stated that the imposition of a cost upon an innocent accused violates the most rudimentary concept of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. Is this not the law of the land?

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction in this case and give plenary consideration to the substantial constitutional questions presented.

Respectfully submitted,

SAM S. PESSIN,
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111 West Washington Street,
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APPENDIX A

MAJORITY OPINION

Docket No. 42845—Agenda 47—March, 1970

JOHN SCHLIB *et al.*, Appellants, *vs.* VINCENT P. KUEBEL, Circuit Clerk, *et al.*, Appellees.

Mr. JUSTICE BURT delivered the opinion of the court:

Plaintiffs appeal from an order of the circuit court of St. Clair County dismissing their complaint against defendants, clerk of the circuit court of St. Clair County, county treasurer of St. Clair County and county of St. Clair, in a class action wherein plaintiffs alleged that the cost retention provisions of section 110—7(f) of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1963, ch. 38, par. 110—7(f) are unconstitutional, and sought recovery on behalf of all those who had been charged with and had paid bail bond costs under the statute in question in the circuit court of St. Clair County from and after the effective date of the act. The case involves substantial constitutional questions, giving this court jurisdiction on direct appeal.

The cause was submitted in the trial court on a stipulation of facts which we summarize here to the extent necessary for purposes of this decision. The act in question was adopted on August 14, 1963. Since that time Vincent P. Kuebel, clerk of the circuit court of St. Clair County, and Maurice J. Joseph, treasurer of said county, and their predecessors in office, acting under the statutory provisions, have collected from plaintiff, John Schlib, and many other defendants in criminal actions, who were acquitted by trial courts of their respective charges, a sum equal to 10% of their respective deposits of bail security. These collections were made in good faith by those officials in

accordance with their oaths of office as understood by them and under color of authority of the act. The exact account of all of said collections are present in the records of said offices and should be agreed upon by the parties for subsequent purposes in the event the court shall award the relief sought by plaintiffs.

On January 16, 1969, Schlib was arrested and charged with leaving the scene of an accident, on which he posted $50 cash bail security and obstructing traffic on which $25 cash bail was posted. He was found guilty of one charge and not guilty of the other. He was charged and paid, in addition to any fine, $5 and $2.50, or a total of $7.50 as cost charges for such bail. A large number of other defendants have paid the 10% bail charge required by the statute after being found guilty (whether by trial or on plea) or upon being found not guilty (either by trial or dismissal.) It was agreed that the essential questions of fact, as concerns the issue, are similar as to all defendants in all criminal cases in said circuit court, since the effective date of the act, who posted cash bail security, and that questions of law are similar in all such cases also as they pertain to the issues, particularly the claim of unconstitutional collection of bail bond costs which is common to the interest of such defendants in criminal cases in said court.

The parties further agreed that there was a *bona fide* dispute between them brought without collusion; that it is impractical if not impossible to join all members of the class to which plaintiff belonged as parties; that this action would avoid undue and unnecessary multiplicity of actions and that plaintiff, Schlib, brings the action in a representative capacity for and on behalf of each member of the class whose interests are similar who would proportionately share in the expenses of the litigation.

In addition to including in their stipulation the entire provisions of section 110—7, the parties refer to section 110—8 (Ill. Rev. Stat. 1969, ch. 38, par. 110—8) and state that it provides in essence for depositing of cash, stocks or bonds in the full amount of bail or pledging interests in real estate in double the amount of bail fixed without payment of any fee and that actual costs of administering the provisions of sections 110—7 and 110—8 are substantially the same but that there may probably be a slightly higher cost attendant upon administering section 110—8.

Finally, the parties agreed that the amount of bail in each particular case is not fixed by the clerk or treasurer but by a judge whose discretion is not guided by statute, rule of court or any fixed standard; that various judges fix the amount of bail for the same types of offenses at various and divers amounts, without relationship as to guilt or innocence of the particular defendant and without relationship of the particular offense and the bail fixed.

Plaintiffs contend that the cost retention provision of section 110—7(f) of the Code of Criminal Procedure is unconstitutional because it violates the equal-protection and due-process clauses of the fourteenth amendment to the Federal constitution and section 2 of article II of the constitution of Illinois. Specifically it is urged that the cost retention provision creates a discriminatory disparity within a homogeneous class; that it operates to create an unconstitutional disparity between the affluent and non-affluent and that it is unconstitutional as creating a disparity among those obtaining release by the deposit of 10% of the amount of bail. Additionally it is claimed that the provision is illegal and void as in violation of section 19 of article II of the Illinois constitution because it amounts to requiring an assessment of costs against a

discharged defendant. Defendants argue that these claims of unconstitutionality are without merit. They also suggest that there is no basis for the bringing of a class action under the facts here involved.

In 1963 the General Assembly enacted the Code of Criminal Procedure (Ill. Rev. Stat. 1963, ch. 38, pars. 100—1 *et seq.*) Among its comprehensive provisions are those of article 10 relative to bail in criminal cases. (Ill. Rev. Stat. 1963, ch. 38, pars. 110—1 to 110—5 inclusive.) Section 110—2 provides for the release of an accused on his own recognizance where from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction. The statute imposes criminal sanctions for failure to appear as required as well as provisions for forfeiture and collection. (Ill. Rev. Stat. 1963, ch. 38, par. 110—2.) Section 110—7 represents a new departure in dealing with the problems of bail in this State. It provides that a person for whom bail has been set shall execute a bail bond and deposit with the clerk of the court a sum of money equal to 10% of the bail upon the deposit of which he shall be released subject to the conditions of the bond which involve forfeiture of the full amount for nonappearance as well as the imposition of a criminal penalty. Section 110—7(f) provides for a return of 90% of the bail deposit when the conditions of the bond have been performed and the accused has been discharged from all obligations with the stipulation that the clerk shall retain as bail bond costs 10% of the amount deposited. (Ill. Rev. Stat. 1963, ch. 38, pars. 110—7(a) (b), (f).) The amount retained represents one percent of the amount of bail originally set by the court. Section 110—8 provides for a different type of procedure in posting bail from that prescribed in section 110

—7. It provides that "in lieu" of the bail deposit provided for in section 110—7 any person for whom bail has been set may execute the bail bond with or without sureties, which bond may be secured by a deposit with the clerk of an amount equal to the bail, of cash, or stocks and bonds, or by real estate situated in this State with unencumbered equity not exempt, owned by the accused or sureties worth double the amount of bail set in the bond. (Ill. Rev. Stat. 1963, ch. 38, par. 110—8.) With the exception of certain changes not directly involved in the questions presented in this appeal the foregoing statutory provisions remain substantially the same at this time and the three alternative means or methods specified in article 10 constitute the only ways in which release on bail can be had in this State. See: Ill. Rev. Stat. 1969, ch. 38, pars. 110—2, 110—7, 110—8.

The above legislative enactments represent substantial reforms in bail practices in this State and came about only after extensive studies of certain evils inherent in our former system and a comparison with practices in the Federal courts and in other jurisdictions. (See Committee Comments, S.H.A., ch. 38, § 110—1 *et seq.* 298 *et seq.*)From this rather extensive and revealing discussion it appears that the central purpose of the legislature in enacting sections 110—7 and 110—8 was to severely restrict the activities of professional bail bondsmen who customarily collected 10% of the amount of a bond as a fee which was retained whether or not the conditions of the bond were met by the accused. The prevalence of this practice was noted in our opinion in *People ex rel. Gendron* v. *Ingram*, 34 Ill: 2d 623, 626, in which this court sustained the constitutionality of the 1965 amendment to section 110—1(g) of the Code of Criminal Procedure making sections 110—7 and 110—8 the exclusive means of posting

bonds in criminal cases in this State. In short, as the Committee Comments show, the object of the statutes was to reduce the cost of liberty to arrested persons awaiting trial. One of the matters noted in connection with the former practice was that the pecuniary loss deterrent to jumping bail which was its central idea was simply not working in a system where payment of a bond premium was required without regard to performance of conditions. At the same time certain studies showed that, in spite of collecting a 10% fee, actual judgment on forfeitures paid by professional bondsmen amounted to only one per cent of the bonds written. It was reasoned, therefore, by those who studied the problem that a much fairer system would result if a plan such as that provided by section 110—7 were evolved with an accused, who has faithfully performed the conditions of his bond, retaining substantially the amount formerly pocketed by the professional bondsman while allowing to the courts a reasonable fee as bond costs for handling bail bonds and offsetting the monetary amount of any loss resulting from the occasional bail jumpers where the professional bondsman under the former system might have forfeited the amount of bail. Otherwise stated, the ultimate objective of this reform was to regain from professional bondsmen the control of bail releases and restore such control to the courts where it rightfully belongs. (See Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 Ill. L. Forum 35, 36-37.) As the author points out, the scheme devised in this State has since been copied in bills introduced in other States and in Congress. As finally adopted the bill passed by Congress eliminated the 10% retention of the cash deposit. (18 U.S.C. 3146(a)(3).) But New York's applicable legislation provides that cash, stocks and bonds may be

deposited in lieu of bail and that a fee of two per cent for receiving, keeping and paying out the same may be charged. See: N.Y. Code of Criminal Procedure, vol. 66, sec. 586.

Plaintiffs' first point is that section 110—7(f) of the Code of Criminal Procedure is unconstitutional because it requires those seeking release under the provisions of section 110—7 to pay bond costs, whereas those who use either section 110—2 (recognizance) or section 110—8 (deposit of full amount in cash or securities or pledge of real estate in double the amount) are not required to pay any costs whatever. In this connection plaintiffs argue that all accused are *sui generis,* for each seeks pretrial release, and that to require payment of costs as a condition of pretrial freedom in the one case and not in the others constitutes an unconstitutional discrimination among the members of a homogenous class.

With respect to plaintiffs' position on unconstitutional classification it will be observed that it rests entirely upon the assumption that there is no basic or reasonable difference between those obtaining release under sections 110—2, 110—7 and 110—8. It is said that all are accused of crime and seek release from pretrial custody and that the difference in their treatment relative to cost is a violation of fundamental concepts of equal protection and due process. In other words, the argument is that because the result of release is sought in each case there is but one class of persons who must be treated alike. However, though the end result may be release in all cases, whatever course may be followed, it must be apparent, we believe, that the means by which release is sought is entirely different in each of the sections of the statute in question. This is not only factually so but historically the legislative approach

to the problems presented was to design the different sections of the statute to meet specific separate problems. (See Committee Comments, S.H.A., ch. 38 § 110—1 *et seq.* p. 298 *et seq.*) Thus section 110—2 providing for release on the accused's own recognizance was designed to meet a condition revealed by factual studies which proved that the great majority of persons released on bail have no intention of violating bail and will appear for trial. The studies further developed a second premise, that to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Section 110—7 (deposit of 10% of the amount fixed for bail with a return of 90% of the deposit on performance of conditions) was designed specifically to fulfill the needs shown by the second premise and curtail the activities of the professional bondsman. This section, by its wording, is obviously designed as the principal method to be used in giving bail. Section 110—8 provides for a method which may be used in "lieu of the bail deposit provided for in section 110—7" and, according to the comment, is designed primarily to meet the need of a method of posting relatively small amounts of cash bail in traffic cases and the like. It is stated in the above reference at p. 324: "It should always be kept in mind, however, that section 110—7 provides for one type of procedure in posting bail, section 110—8 another."

It appears that the legislature did not consider itself as dealing with a single problem—*i.e.*, a provision of procedures for those entitled to bail generally. Instead it regarded situations possibly giving rise to separate needs and sought to accommodate those requirements. As to section 110—7, as already related, it sought to reduce the cost of bail and the high incidence of "bail gouging" by

providing a method whereby any citizen accused of crime might have his liberty pending trial with a minimum of cost. On the other hand, it was careful to recognize and protect the rights of those who could and should be released upon ther own recognizance within the limits of judicial discretion without any bond cost whatever. In none of the provisions in question is release conditioned upon the payment of bail costs in advance nor can payment of the one percent fee ultimately deducted under section 110—7(f) be considered a condtion precedent to the selection of section 110—7 as the method of acquiring release. The only condition precedent to release under the provisions of section 110—7 is the payment of 10% of the amount of bail as fixed by the court, and plaintiffs disclaim any thought of questioning the constitutionality of that requirement, for they say that the sole question before the court is the constitutionality of subparagraph (f) of section 110—7. Further, they say: "The plaintiffs herein wish to make it eminently clear that they do not in any manner fault the principles of Article 110 of the Illinois Code, they do however, take exception to the cost provision of Section 110—7(f) which is patently unconstitutional." The ultimate question on this portion of the case is, therefore, whether the provisions of subsection (f) of section 110—7 are fatal to an otherwise admittedly valid legislative classification as provided in the three sections in question and particularly that of section 110—7.

This court has held that the test whether a legislative act affords equal protection to all persons affected by it is "whether the legislative enactment requires the same means and methods to be employed alike by the persons composing the class affected so that the law operates uniformly on all persons similarly situated." (*Reif* v. *Barrett*,

355 Ill. 104, 121.) Where a law affects all members of the same class alike it is not objectionable as constituting class legislation. (*Smith* v. *Hill,* 12 Ill. 2d 588, 598.) Under article 10 of the Code of Criminal Procedure as presently enacted those entitled to bail have a choice of three methods to be used in securing release, and the choice is entirely voluntary and without compulsion. Those who elect to secure release by the deposit of 10% of the amount of bail under the provisions of section 110—7 constitute a separate class under the legislative plan and purpose as already indicated. They are not automatically placed in this class or category by the law. They join only by the exercise of their own volition. Presumably they know that the amount deposited will be subject to deduction and we know of no law or constitutional provision which would preclude their being required to pay a reasonable amount for the privilege extended to those who elect to come into this class. The requirement of a fee to help defray the cost of administrative services in the courts is a traditional and basic concept recognized as valid by this court. See: *People ex rel. Flanagan* v. *McDonough,* 24 Ill. 2d 178, 180-181.

Plaintiffs also contend that the cost retention provision of section 110—7(f) creates an unconstitutional disparity between the affluent and nonaffluent. It is said for a supposed example that accused "A" availing himself of section 110—8 deposits the full amount of bond and pays no cost, whereas accused "B", lacking sufficient property, obtains his release by depositing 10% of the full amount of bond under section 110—7 and is assessed a cost. It is argued that accused "B" is thus assessed a cost merely because his lack of affluence makes him unable to obtain his release by depositing the full amount under the provisions of section 110—8. Without stating any factual

source, plaintiffs further state that "a considerable percentage of individuals, like accused 'B' have *no choice* but to seek release on their own recognizance under Section 110—2 or the 10% provision of Section 110—7" because they have neither cash nor real estate in sufficient amount to post the full amount of their bail. These are said to be "poor men" who should not be discriminated against due to their lack of wealth. Plaintiffs say that if the size of a deposit for bail is the distinguishing factor which rendered this group different from those who deposit the full amount of bail, there is an unconstitutional differentiation which is not cognizable in law and creates a disparity based on wealth. In support of their position plantiffs cite a number of cases such as *Griffin* v. *Illinois,* 351 U.S. 12; 100 L. Ed. 891, 76 S. Ct. 585, establishing the general proposition that the individual cannot be penalized in his quest for justice due to lack of wealth. Defendants concede the validity of this principle but deny that it is applicable under the facts presented here.

The difficulty with plaintiffs' position is that it is based primarily on the assumption that a majority or at least "a large percentage" of those seeking bail would prefer to elect to proceed under section 110—8 but lack the financial means to do so and are therefore forced against their wills to ask for bail under section 110—7 by posting the deposit. We find no support for this assumption in any of the stipulated facts. As we view the situation it is just as reasonable to assume that most of those eligible would elect to perfect bail under section 110—7 because of the convenience it affords and the very small cost of only one percent actually involved. Proceedings under section 110—8 necessarily involve tying up money and property for an indefinite period. In the case of a large bond the amount pledged would be in proportion and the conse-

quent economic loss through deprivation of the opportunity to invest these funds could be considerable. It is reasonable to suppose, therefore, that even the relatively affluent would prefer to make bail under section 110—7. In any event we do not believe it can reasonably be said that choice between the means to be used is necessarily dictated by wealth or lack of wealth of the accused.

Where questions of classification are involved the reasons justifying the classification need not appear on the face of the statute and the classification will be upheld if any state of facts can reasonably be conceived to sustain it. The burden therefore rests upon one who assails the statute to negate the existence of such facts. (*Thorpe* v. *Mahin,* 43 Ill. 2d 36, 45; *Department of Revenue* v. *Warren Petroleum Corp.,* 2 Ill. 2d 483, 489-490.) As already indicated, we believe that facts can reasonably be conceived to sustain the legislation here involved as against plaintiffs' argument that there is necessarily a discrimination based on wealth. We find nothing in plaintiffs' argument which reasonably tends to negate the existence of those facts and certainly there is nothing by way of concrete evidence which does so.

As to plaintiffs' argument that the cost retention provision of section 110—7(f) creates a disparity among those obtaining release by the deposit of 10% of the amount of bail, it is said that accused "A" whose bond is set at $10,000 must deposit $1,000 and that upon fulfillment of conditions he receives a refund of $900 with the result that he has paid a cost of $100. "B" on the other hand, whose bond is fixed at only $1,000, deposits $100 and receives a refund of $90 resulting in a cost of only $10. It is claimed that there is no rational basis for this difference. While the dollar amount in the supposed

cases is different, each has paid an amount equal to one percent of his bail and therefore there is payment of the same proportionate amount in each case. Plaintiffs present no authority which sustains the proposition that enacting a charge in the same proportion in such cases involves unconstitutional discrimination and we know of no authority which would support this claim. Historically many fees and charges for the services of court officers have been fixed in proportion to the amount involved. As far as we know there has been no suggestion of unconstitutional action in such cases as long as all persons similarly situated are charged in the same proportion and at the same rate: Flat rates are also found in the field of taxation, as defendants suggest, including income taxes, retailers' occupation taxes, real-estate taxes, use taxes, and inheritance and transfer taxes. The constitutionality of these enactments has been repeatedly sustained by the courts.

Finally, there is the contention that the cost provision of section 107—7(f) is illegal and void because it amounts to an assessment of court costs against a discharged defendant. Plaintiffs cite *Wells* v. *McCullock,* 13 Ill. 606, and *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, on this point. *Wells* involves an attempt to impose on an acquitted defendant court costs he has made in his defense. The court, relying largely upon the provisions of the statute relative to disposition of the question of costs in such cases, held that the defendant was not liable for their payment. In *Giaccio* the validity of a Pennsylvania statute authorizing the jury to impose the costs of a criminal prosecution on an acquitted defendant in a misdemeanor case was in question. The court held the statute unconstitutional on the ground of vagueness and the absence of any standards sufficient to enable a

defendant to protect himself against arbitrary and discriminatory imposition of costs by a jury. But it did not say that the imposition of such costs would be unconstitutional in any event. However, whatever the rule might be as to the imposition of court costs on an acquitted or discharged defendant, it has no application here. The payment of costs for prosecution is governed by an entirely different statute from that dealing with costs charged for the administration of bail bonds. The statute concerning the latter, as already observed, is section 110—7 of the Code of Criminal Procedure. Costs of prosecution in criminal cases are provided for in section 180—3 of the Code of Criminal Procedure as follows: "When any person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution." (Ill. Rev. Stat. 1969, ch. 38, par. 180—3.) This statute obviously refers only to court costs and has no reference to bond costs which are chargeable regardless of what subsequently occurs in the prosecution of the case and regardless of the guilt or innocence of the accused. It may be conceded that court costs sustained in his defense may not properly be assessed against an accused who has won his discharge or acquittal but that has no bearing whatever on bond costs and the retention of a percentage of such costs is not tantamount to the assessment of court costs against a discharged defendant.

In conclusion we find that the classifications provided for in the statutes here involved bear a reasonable relation to the objects sought to be accomplished and are uniform as to all members of a particular class sought to be affected. No unconstitutional discrimination is involved

and the legislative enactments are not in violation of fundamental concepts of due process or equal protection of the law. Since the conclusion we have reached favors constitutionality it becomes unnecessary to discuss the other question raised, *i.e.*, the propriety of a class action.

The judgment of the circuit court of St. Clair County is affirmed.

Judgment affirmed.

Kluczynski and Schaefer, J.J., dissenting.

APPENDIX B

DISSENTING OPINION

Mr. JUSTICE KLUCZYNSKI, dissenting:

I cannot agree with the conclusions of the majority opinion.

Through *Griffin* v. *Illinois,* 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, and its progeny, it has become well established that the equal-protection and due-process clauses of the fourteenth amendment require that a defendant not be penalized in a criminal proceeding due to a lack of wealth. I believe that this type of penalty exists in the treatment of various defendants under sections 110—7 and 110—8 of the Code of Criminal Procedure. A disparity of treatment results because under 110—7 the clerk retains 1% of the bail as a cost whereas under 110—8 or 110—2, no costs are involved. It is discriminatory in that some defendants cannot voluntarily choose under which bail provision they will be released. The defendant who, because of lack of wealth, cannot meet the requirements of 110—8 and who cannot qualify for release under 110—2, is forced to seek relief under 110—7, the only section which involves a cost. The majority would have us believe that there are no nonaffluent defendants or that if given the choice most defendants would choose section 110—7 for economic reasons. This court must take judicial notice of the fact that many defendants cannot afford to pay the full amount of the bail. Plaintiff has cited many authorities (Bail Reform Act of 1966, 18 U.S.C. 3141-3152; Congressional Record, vol. 112 Con. Rec. 89th Congress, Second Session pp. 12488-12504; S.H.A. ch. 38, art. 119, Committee Comments, p. 298; Attorney General's

Committee on Povery and the Administration of Criminal Judicial Procedure, U.S.C. Cong. and Admin. News 1966; National Conference on Bail and Criminal Justice, May 27, 1964) for the proposition that as the amount of bail increases, the percentage of defendants who can pay the full amount of the bail decreases. In addition, the Committee Comments (S.H.A. ch. 38, art. 110, at p. 300) state that section 110—8 is an alternative to 110—7 for "those who have the means." Once it is established that certain defendants are not financially able to proceed under section 110—8, it is no longer significant that most or all defendants would elect to proceed under section 110—7. The important consideration is not what section they would elect, but rather whether every defendant has a choice of the two sections. Realizing that certain defendants have no choice but to pay a cost under 110—7, while other financially able defendants can elect to pay nothing under 110—8, I must find that the sections in question deny equal protection and due process.

Further, in *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, the United States Supreme Court considered the question whether a defendant may be punished after finding him not guilty. The concurring opinion specifically found: "* * * the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." (382 U.S. at 405.) This same concept has been recognized in Illinois in our constitution, case law, and legislative enactment. Section 19 of article II of the Illinois constitution provides that every person "ought to obtain, by law, right and justice freely, and without being obliged to purchase it, * * *." Any defendant who

is forced through economic circumstances to proceed under section 110—7 is "obliged" to pay costs for his constitutional right to pretrial liberty in violation of this provision.

This court, in *Wells* v. *McCullock*, 13 Ill. 606, held that a party who is indicted under the Criminal Code, and is acquitted, is not liable for costs. While it is true that the case involved the interpretation of a statute then in effect, a statute similar to it is presently in effect. (Ill. Rev. Stat. 1963, ch. 53, par. 32.) The court in *Wells* found that "An acquittal, or other legal discharge, absolves the defendant from the payment of *all* costs." (Emphasis added.) (13 Ill. at 608.) Any cost, whether it be termed court cost or administrative cost, is an expense in a criminal defense, and if the defendant is acquitted, imposing such a cost, in my opinion, violates the due-process clause and section 19 of article II of the Illinois constitution.

Mr. JUSTICE SCHAEFER joins in this dissent.

APPENDIX C

(SEAL)
STATE OF ILLINOIS
Office Of
CLERK OF THE SUPREME COURT
Springfield 62706
December 3, 1970

JUSTIN TAFT
Clerk
Mr. Sam S. Pessin
25 West Main Street
Belleville, Illinois 62220

Dear Mr. Pessin:

In Supreme Court today, in Case No. 42845 entitled:

John Schlib, Indv., etc.,
appellant

vs.

Vincent P. Kuebel, as Clerk of the
Circuit Court of St. Clair County,
et al., etc.,
appellees

Petition for Rehearing: Denied

I am enclosing the dissenting opinion of Mr. Justice Kluczynski concerning the above entitled cause.

Very truly yours,

/S/ JUSTIN TAFT,
Clerk of the Supreme Court.

APPENDIX D

ARTICLE 110. BAIL

110—1. § 110-1. **Definitions.)** (a) "Security" is that which is required to be pledged to insure the payment of bail.

(b) "Surety" is one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all conditions of the bail bond.

110—2. § 110-2. **Release on Own Recognizance.)** When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32—10 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with sub-section (g) of Section 110—7 of this Code.

This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.

110—3. § 110-3. **Issuance of Warrant.)** Upon failure to comply with any condition of a bail bond or recognizance the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or his own recognizance.

110—4. §110-4. **Bailable Offenses.)** (a) All persons shall be bailable before conviction, except when death is a pos-

sible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense.

(b) A person charged with an offense for which death is a possible punishment has the burden of proof that he should be admitted to bail.

110—. § 110-5. Determining the Amount of Bail.)

(a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused.

6) When a person is charged with an offense punishable by fine only the amount of the bail shall not exceed double the amount of the maximum penalty.

(c) When a person has been convicted of an offense and only a fine has been imposed the amount of the bail shall not exceed double the amount of the fine.

110—6. § 110-. Reduction or Increase of Bail.)

(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond.

(b) Reasonable notice of such application by the defendant shall be given to the State.

(c) Reasonable notice of such application by the State shall be given to the defendant, except as provided in subsection (d).

(d) Upon verified application by the State stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order authorized by subsection (a).

110—7. § 110-7. **Deposit of Bail Security.)** (a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110—6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing

or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the court to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a

deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment. As amended by act approved July 31, 1967. L. 1967, p. ——, H.B. No. 862.

110—8. § 110-8. **Cash, Stocks, Bond and Real Estate as Security for Bail.)** (a) In lieu of the bail deposit provided for in Section 110—7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

(2) By real estate situated in this State with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

b) If the bail bond is secured by cash or stocks and bonds the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified;

(2) The market value of each stock and bond.

(3) The total market value of the stocks and bonds listed;

(4) A statement that the affiant is the sole owner of the stocks and bonds listed and they are not exempt from execution;

(5) A statement that such stocks and bonds have not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that such stocks and bonds are security for the appearance of the accused in accordance with the conditions of the bail bond.

(c) If the bail bond is secured by real estate the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A legal description of the real estate;

(2) A description of any and all encumbrances on the real estate including the amount of each and the holder thereof;

(3) The market value of the unencumbered equity owned by the affiant;

(4) A statement that the affiant is the sole owner of such unencumbered equity and that it is not exempt from execution;

(5) A statement that the real estate has not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that the real estate is security for the appearance of the accused in accordance with the conditions of the bail bond.

(d) The sworn schedule shall constitute a material part of the bail bond. The affiant commits perjury if in the sworn schedule he makes a false statement which he does not believe to be true. He shall be prosecuted and punished accordingly, or, he may be punished for contempt.

(e) A certified copy of the bail bond and schedule of real estate shall be filed immediately by the court in the office of the registrar of titles or recorder of deeds of the county in which the real estate is situated and the State shall have a lien on such real estate from the time such copies are filed in the office of the registrar of titles or

recorder of deeds. The registrar of titles or recorder of deeds shall enter, index and record (or register as the case may be) such bail bonds and schedules without requiring any advance fee, which fee shall be taxed as costs in the proceeding and paid out of such costs when collected.

(f) When the conditions of the bail bond have been performed and the accused has been discharegd from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused and his sureties for the amount of the bail and costs of the proceedings.

(h) When judgment is entered in favor of the State on any bail bond the State's Attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the cash, stocks or bonds deposited with the clerk of the court and the real estate described in the bail bond schedule. The cash shall be

used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The stocks, bonds and real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

(i) No stocks, bonds or real estate may be used or accepted as bail bond security in this State more than once in any 12 month period. As amended by act approved July 31, 1967. L. 1967, p. ——, H.B. No. 862.

110—9. § 110-9, **Taking of Bail by Peace Officer.)** When bail has been set by a judicial officer for a particular offense or offender any sheriff or other peace officer may take bail in accordance with the provisions of Section 110—7 or 110—8 of this Code and release the offender to appearance in accordance with the conditions of the bail bond, the Notice to Appear or the Summons. The officer shall give a receipt to the offender for the bail so taken and within a reasonable time deposit such bail with the clerk of the court having jurisdiction of the offense.

110—10. § 110—10. Conditions of Bail Bond.) (a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will:

(1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as odered by the court until discharged or final order of the court;

(2) Submit himself to the orders and process of the court; and

(3) Not depart this State without leave.

(b) If the defendant is admitted to bail after conviction the conditions of the bail bond shall be that he will:

(1) Duly prosecute his appeal;

(2) Appear at such time and place as the court may direct;

(3) Not depart this State without leave of the court and

(4) If the judgment is affirmed or the cause reversed and remanded for a new trial, forthwith surrender to the officer from whose custody he was bailed.

110—11. § 110—11. Bail on a New Trial.) If the judgment of conviction is reversed and the cause remanded for a new trial the trial court may order that the bail stand pending such trial, or reduce or increase bail.

110—12. § 110—13. Persons Prohibited from Furnishing Bail Security.) No attorney at law practicing in this State and no official authorized to admit another to bail or to accept bail shall furnish any part of any security for bail in any criminal action or any proceeding nor shall any such person act as surety for any accused admitted to bail.

110—14. § 110—14. Credit for Incarceration on Bailable Offense.) Any person incarcerated on a bailable offense

who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

110—15. § 110—15. **Applicability of Provisions for Giving and Taking Bail.)** The provisions of Sections 110—7 and 110—8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail. In all cases where a person is admitted to bail the provisions of Sections 110—7 and 110—8 of this Code shall be applicable.

However, the Supreme Court may, by rule or order, prescribe a uniform schedule of amounts of bail in specified traffic and conservation cases, quasi-criminal offenses, and misdemeanors. Such uniform schedule may provide that the cash deposit provisions of Section 110—7 shall not apply to bail amounts established for alleged violations punishable by the fine alone, and the schedule may further provide that in specified traffic cases a valid Illinois chauffeur's or operator's license must be deposited, in addition to 10% of the amount of the bail specified in the schedule. As amended by act approved Aug. 14, 1967. L. 1967, p. ——, S.B. No. 1168.

APPENDIX E

88th CONGRESS
2d Session

S. 2840

IN THE SENATE OF THE UNITED STATES
May 14 (legislative day, March 30), 1964

Mr. Ervin (for himself, Mr. Hruska, Mr. Fong, Mr. Bayh, Mr. Williams of New Jersey, and Mr. Johnston) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To further implement the constitutional right to bail by permitting persons admitted to bail to make a cash deposit with the court in lieu of providing securities or other collateral security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 207 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"§3147. **Cash deposit**

"(a) Whenever the amount of bail has been fixed in the case of any person charged with an offense against the United States, such person shall execute a bond for his appearance, and, in lieu of providing other collateral security or sureties, may deposit in the registry of the court a sum equal to 10 per centum of the amount of bail so

fixed. Upon the deposit of such sum such person shall be released from custody subject to the conditions of this bond.

"(b) If there is no breach of condition of a bond given by any person as provided in subsection (a), the court shall release such person from the obligation of the bond, but shall retain 10 per centum of the sum deposited by such person to defray bail bond costs. The balance of such deposit shall, no judgment for court costs and/or fine being entered against such person, be returned to him. In the event judgment for court costs and/or fine is entered against such person, the balance of such deposit shall be first applied to the payment of such judgment.

"(c) If there is a breach of condition of a bond given by any person as provided in subsection (a), the court shall declare a forfeiture of the full amount of the bail fixed in the case of such person. Notice of the forfeiture shall be mailed to such person at his last known address, and, if such person does not appear as required within thirty days after the mailing of such notice and the forfeiture is not set aside by the court, the court shall render judgment of default against such person in the full amount of the bail. The court may direct that any such forfeiture be set aside if, under all the circumstances, it appears that justice does not require the enforcement thereof. Any judgment of default against such person shall be enforced by all available processes of the court, and the amount deposited by such person in the registry of the court shall be applied to the payment of costs and the balance thereof shall be applied to th judgmnt

"(d) Nothing in this section shall limit in any way the application of section 3146 of this title to any person."

(b) The analysis of chapter 207 of title 18, United States Code, is amended by inserting at the end thereof the following:

"3147. Cash deposit."

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 20 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1412~~ 70-90

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

VS.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

On appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1412

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

On appeal from the Supreme Court of the State of Illinois

MOTION TO DISMISS

Vincent P. Kuebel, as Clerk of the Circuit Court of St. Clair County, Illinois, and Maurice F. Joseph, as County Treasurer of St. Clair County, and the County of St. Clair, by their and its attorney, Robert H. Rice, State's Attorney of St. Clair County, move the Court to dismiss the appeal on the grounds that it does not present a substantial federal question.

The facts surrounding this appeal are correctly set forth in the Jurisdictional Statement under the heading "Statement of the Case." The judgment and opinion of the Supreme Court of the State of Illinois from which appeal is taken and the State statutes involved are correctly set forth in Appendix "A" and "D" to the Jurisdictional Statement.

I.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE COST PROVISIONS OF ILLINOIS' STATUTORY SCHEME PROVIDING FOR PRE-TRIAL RELEASE OF CRIMINAL DEFENDANTS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

As the facts stated in the Illinois Supreme Court opinion make clear (46 Ill. 2d 538, 540), this case does not involve criminal defendants who cannot obtain pretrial freedom because of their indigence. Rather, the named appellant and all members of the asserted class obtained pretrial freedom by posting 10% of the bail set in their cases. This liberal method of making bail is permitted under Illinois law under Section 110-7 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 110-7). The appellants real complaint is with the bail cost provision found in Section 110-7(f) of the Code (Ill. Rev. Stat. 1969, ch. 38, par. 110-7[f]).

The Illinois Supreme Court accurately outlined appellants' equal protection claim as follows:

> "Plaintiffs' first point is that Section 110-7(f) of the Code of Criminal Procedure is unconstitutional because it requires those seeking release under the provisions of Section 110-7 to pay bond costs, whereas those who use either section 110-2 (recognizance) or section 110-8 (deposit of full amount in cash or securities or pledge of real estate in double the amount) are not required to pay any costs whatever. In this connection plantiffs argue that all accused are *sui generis,* for each seeks pretrial release, and that to require payment of costs as a condition of pretrial freedom in the one case and not in the others consti-

> tutes an unconstitutional discrimination among the members of a homogenous class."
>
> 46 Ill. 2d 538, 545

In support of this argument, appellants here rely primarily upon this Court's decision in *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). Although not cited by appellants when this case was before the Illinois Supreme Court, and hence not discussed in either the majority or dissenting opinions filed by that Court, *Rinaldi* may be easily distinguished.

In *Rinaldi* this Court held a New Jersey statute unconstitutional which required only those indigents who were imprisoned after an unsuccessful appeal of their criminal convictions to reimburse the county for the costs of their trial transcript used on appeal. Since indigent parolees and convicted indigent defendants not imprisoned were not required to repay transcript costs, this Court could find no rational basis for singling out prisoners to pay such costs.

The factors giving rise to Illinois' bail reform legislation are far different and more complex than the considerations that prompted the enactment of the statute involved in *Rinaldi.* The legislative solution to the problem presented by the harshness of the methods for obtaining pretrial freedom in Illinois under prior law obviously called for a more sophisticated approach than that arrived at by New Jersey in *Rinaldi.* The Illinois Supreme Court's opinion states:

> "With respect to plaintiffs' position on unconstitutional classification it will be observed that it rests entirely upon the assumption that there is no basic or reasonable difference between those obtaining release under sections 110-2, 110-7 and 110-8. It is said that

all are accused of crime and seek release from pretrial custody and that the difference in their treatment relative to cost is a violation of fundamental concepts of equal protection and due process. In other words, the argument is that because the result of release is sought in each case there is but one class of persons who must be treated alike. However, though the end result may be release in all cases, whatever course may be followed, it must be apparent, we believe, that the means by which release is sought is entirely different in each of the sections of the statute in question. This is not only factually so but historically the legislative approach to the problems presented was to design the different sections of the statute to meet specific separate problems. (See Committee Comments, S.H.A., ch. 38, § 110-1 *et seq.* p. 298 *et seq.*) Thus section 110-2 providing for release on the accused's own recognizance was designed to meet a condition revealed by factual studies which proved that the great majority of persons released on bail have no intention of violating bail and will appear for trial. The studies further developed a second premise, that to the extent that pecuniary loss is a deterrent, such financial loss should be minimized in the case of the person who appears for trial. Section 110-7 (deposit of 10% of the amount fixed for bail with a return of 90% of the deposit on performance of conditions) was designed specifically to fulfill the needs shown by the second premise and curtail the activities of the professional bondsman. This section, by its wording, is obviously designed as the principal method to be used in giving bail. Section 110-8 provides for a method which may be used in "lieu of the bail deposit provided for in section 110-7" and, according to the comment, is designed primarily to meet the need of a method of posting relatively small amounts of cash bail in traffic cases and the like. It is stated in the above reference at p. 324: "It should always be kept in mind, however, that section 110-7 provides for

one type of procedure in posting bail, section 110-8 another."

It appears that the legislature did not consider itself as dealing with a single problem—*i.e.*, a provision of procedures for those entitled to bail generally. Instead it regarded situations possibly giving rise to separate needs and sought to accommodate those requirements. As to section 110-7, as already related, it sought to reduce the cost of bail and the high incidence of "bail gouging" by providing a method whereby any citizen accused of crime might have his liberty pending trial with a minimum of cost. On the other hand, it was careful to recognize and protect the rights of those who could and should be released upon their own recognizance within the limits of judicial discretion without any bond cost whatever. In none of the provisions in question is release conditioned upon the payment of bail costs in advance nor can payment of the one percent fee ultimately deducted under section 110-7(f) be considered a condition precedent to the selection of section 110-7 as the method of acquiring release."

46 Ill. 2d 538, 545-547

Thus, it may be said that in rearranging and softening the economic burdens of the pretrial release system, the Illinois legislature choose to impose minimal costs only in cases where the cirminal offense was more serious and where the amount of bail set is proportionately higher, rather than to impose that burden upon those charged with relatively minor offenses.[1] This judgment cannot be said to be devoid of all rationality.

An adjunct to appellants' claim of a violation of equal protection is the assertion that the cost provision discrim-

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1. See Committee Comments, Ch. 38, Art. 110, Smith-Hurd Ill. Annot. Stats., pp. 145-149, 158, and 163-166.

inates in favor of the rich and against the poor criminal defendant. In regard to this contention, the Illinois Supreme Court stated:

> "Plaintiffs also contend that the cost retention provision of section 110-7(f) creates an unconstitutional disparity between the affluent and nonaffluent. It it said for a supposed example that accused "A" availing himself of section 110-8 deposits the full amount of bond and pays no cost, whereas accused "B", lacking sufficient property, obtains his release by depositing 10% of the full amount of bond under section 110-7 and is assessed a cost. It is argued that accused "B" is thus assessed a cost merely because his lack of affluence makes him unable to obtain his release by depositing the full amount under the provisions of section 110-8. Without stating any factual source, plaintiffs further state that "a considerable percentage of individuals, like accused 'B' have *no choice* but to seek release on their own recognizance under Section 110-2 or the 10% provision of Section 110-7" because they have neither cash nor real estate in sufficient amount to post the full amount of their bail. These are said to be "poor men" who should not be discriminated against due to their lack of wealth. Plaintiffs say that if the size of a deposit for bail is the distinguishing factor which rendered this group different from those who deposit the full amount of bail, there is an unconstitutional differentiation which is not cognizable in law and creates a disparity based on wealth. In support of their position plaintiffs cite a number of cases such as *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585, establishing the general proposition that the individual cannot be penalized in his quest for justice due to lack of wealth. Defendants concede the validity of this principle but deny that it is applicable under the facts presented here.
>
> The difficulty with plaintiffs' position is that it is based primarily on the assumption that a majority

> or at least "a large percentage" of those seeking bail would prefer to elect to proceed under section 110-8 but lack the financial means to do so and are therefore forced against their wills to ask for bail under section 110-7 by posting the deposit. We find no support for this assumption in any of the stipulated facts. As we view the situation it is just as reasonable to assume that most of those eligible would elect to perfect bail under section 110-7 because of the convenience it affords and the very small cost of only one percent actually involved. Proceedings under section 110-8 necessarily involve tying up money and property for an indefinite period. In the case of a large bond the amount pledged would be in proportion and the consequent economic loss through deprivation of the opportunity to invest these funds could be considerable. It is reasonable to suppose, therefore, that even the relatively affluent would prefer to make bail under section 110-7. In any event we do not believe it can reasonably be said that choice between the means to be used is necessarily dictated by wealth or lack of wealth of the accused."
>
> 46 Ill. 2d 538, 548-549

In addition, we may also state what is common knowledge, i.e., that non-affluence may cause hardships that the rich can often avoid. See, e.g., *Williams* v. *Shaffer,* 222 Ga. 334, 149 S.E. 2d 668, *cert. denied,* 385 U.S. 1037, 87 S. Ct. 772 (1967); *McDonald* v. *Board of Election,* 394 U.S. 802 (1969); *McInnis* v. *Shapiro,* 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd,* 394 U.S. 322 (1969); *Bandy* v. *U.S.,* 82 S. Ct. 11 (1961); *Douglas* v. *California,* 372 U.S. 353 (1963) [Especially Mr. Justice Clark's dissenting opinion, wherein he describes this Court's practice in considering in *forma pauperis* applications. 372 U.S. 353, 359.] However, this fact standing alone does not render a statutory

scheme unconstitutional.[2] The fact that there may be some rich criminal defendants in Illinois who can always produce the full amount of very high bail in cash, or who are willing to remain in confinement until bail can be arranged under the more cumbersome methods provided, does not mean that Illinois is guilty of an "invidious discrimination" against poor criminal defendants. Finally, we reiterate that what is involved in this case is not a denial of pretrial freedom because of indigence, but an asserted right to pretrial release without cost. What was said in *McDonald* v. *Board of Election* is, therefore, appropos here:

> "* * * a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind', *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Ozan Lumber Co.* v. *Union National Bank*, 207 U.S. 251 (1907)."

394 U.S. 802, 809.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE COST PROVISION OF ILLINOIS' STATUTORY SCHEME PROVIDING FOR PRETRIAL RELEASE OF CRIMINAL DEFENDANTS DOES NOT VIOLATE THE DUE PROCESS CLAUSE.

Appellants' Due Process claim is based upon the fact that the cost provision of Section 110-7(f) is imposed re-

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2. It should again be noted here that Illinois law permits pretrial release on the defendant's own recognizance. Section 110-2 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 110-2).

gardless of the outcome of the criminal prosecution. Relying on *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), appellants claim that the imposition of a cost for bail on an acquitted defendant violates the concept a fair procedure guaranteed by the Due Process Clause.

In disposing of this claim the Illinois Supreme Court observed:

> Finally, there is the contention that the cost provision of section 110-7(f) is illegal and void because it amounts to an assessment of court costs against a discharged defendant. Plaintiffs cite *Wells,* v. *McCullock,* 13 Ill. 606, and *Giaccio* v. *Pennsylvania,* 382 U.S. 399, 15 L. Ed. 2d 447, 86 S. Ct. 518, on this point. *Wells* involves an attempt to impose on an acquitted defendant court costs he has made in his defense. The court, relying largely upon the provisions of the statute relative to disposition of the question of costs in such cases, held that the defendant was not liable for their payment. In *Giaccio* the validity of a Pennsylvania statute authorizing the jury to impose the costs of a criminal prosecution on an acquitted defendant in a misdemeanor case was in question. The court held the statute unconstitutional on the ground of vagueness and the absence of any standards sufficient to enable a defendant to protect himself against arbitrary and discriminatory imposition of costs by a jury. But it did not say that the imposition of such costs would be unconstitutional in any event. However, whatever the rule might be as to the imposition of court costs on an acquitted or discharged defendant it has no application here. The payment of costs for prosecution is governed by an entirely different statute from that dealing with costs charged for the administration of bail bonds. The statute concerning the latter, as already observed, is section 110-7 of the Code of Criminal Procedure. Costs of prosecution in criminal cases are provided for in section 180-3 of the

Code of Criminal Procedure as follows. "When any person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution." (Ill. Rev. Stat. 1969, ch. 38, par. 180-3.) This statute obviously refers only to court costs and has no reference to bond costs which are chargeable regardless of what subsequently occurs in the prosecution of the case and regardless of the guilt or innocence of the accused. It may be conceded that court costs sustained in his defense may not properly be assessed against an accused who has won his discharge or acquittal but that has no bearing whatever on bond costs and the retention of a percentage of such costs is not tantamount to the assessment of court costs against a discharged defendant. 46 Ill. 2d 538, 551-552.

III.

CONCLUSION

For all of the above reasons, we respectfully state that the Illinois Supreme Court correctly affirmed the dismissal of appellants' complaint, and that this appeal should be dismissed because it does not present a substantial federal question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-90

No. ~~1412~~

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Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1412

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

BRIEF FOR APPELLANTS

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois (A. 30-47; Rec. 8) are reported at 46 Ill. 2d 538; 264 N.E. 2d 377.

JURISDICTION

This action was instituted by John Schilb, individually and for all others similarly situate, who were charged bail costs under Section 110-7(f) of the Illinois Criminal Code (Ill. Rev. Stat. 1963 etc. Ch. 38, Par. 110-7(f)) (App. B, iii-xiii).

The complaint sought a declaratory judgment that Section 110-7(f) violates the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States (A. 4-13; Rec. C-2—C-8). The Circuit Court of St. Clair County, Illinois, specifically held Section 110-7(f) of the Illinois Criminal Code constitutional (A. 22-23; Rec. C-18). An appeal was taken to the Supreme Court of the State of Illinois which on October 7, 1970, affirmed the decision of the trial court (A. 30-44; Rec. 8).

A Petition for Rehearing was filed (A. 49; Rec. 10) and thereafter, on December 3, 1970, the Petition was denied (A. 50-51; Rec. 11) and the dissenting opinion of Justice Thomas E. Kluczynski and Justice Walter V. Schaefer filed (A. 30, 44-47; Rec. 8). A Motion for Reconsideration of the denial of the Petition for Rehearing was denied on January 14, 1971 (A. 51-52; Rec. 13).

The Notice of Appeal to the Supreme Court of the United States was filed on February 12, 1971 (A. 54; Rec. 16). The Jurisdictional Statement and Record were filed and docketed on March 1, 1971, and probable jurisdiction noted on April 26, 1971.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Illinois by appeal is invoked and conferred by 28 U.S.C.

1257(2), for the validity of a statute of the State of Illinois was drawn in question on the grounds of being repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of Illinois is in favor of its validity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This cause directly involves the constitutionality of the bail cost retention provision of Section 110-7(f) of Article 110 of the Illinois Criminal Code (Ill. Rev. Stat. 1963 etc. Ch. 38, Par. 110-1 *et seq.*), in relation to the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution of the United States is appended hereto as Appendix A.

Article 110 of the Illinois Criminal Code is appended hereto as Appendix B.

QUESTIONS PRESENTED

The following questions relating to the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States are presented by this appeal:

1. May a State impose a bail cost on only one segment of a class gaining pretrial release?

2. May a State impose bail costs on the poor and non-affluent while imposing no like costs on the rich and affluent?

3. May a State impose a bail cost on the innocent?

STATEMENT OF THE CASE

The Seventy Third General Assembly of the State of Illinois revised its statutory bail procedures by enacting Article 110 of the Illinois Criminal Code (Ill. Rev. Stat. 1963, Ch. 38, Par. 110-1 *et seq.*) (App. B, iii-xiii).

Article 110 provides for the pretrial release of an accused in one of three ways: his individual recognizance (Sec. 110-2) (App. B, iii); by deposit of 10% of the full amount of bail (Sec. 110-7) (App. B, v-vii); or, by deposit of cash, stocks or bonds in the full amount of bail, or pledging real estate in double the amount of bail (Sec. 110-8) (App. B, vii-xi). This statute further provides for the imposition of a bail cost on those released on deposit of 10% of bail (Sec. 110-7(f)) (App. B, vi).

John Schilb, a resident of Belleville, St. Clair County, Illinois, was arrested on January 16, 1969 on two charges. He gained his pretrial freedom by depositing $50.00 and $25.00 and on June 6, 1969 was found guilty on one of the charges and not guilty on the other charge. He paid $5.00 and $2.50, or a total of $7.50 pursuant to the above statutory provision (A. 17-22; Rec. C-14—C-17).

On July 29, 1969, John Schilb, individually and on behalf of all others similarly situate, as a class, filed a Complaint in Chancery in the Circuit Court of St. Clair County alleging the bail cost retention provision of Section 110-7(f) of the Illinois Criminal Code ". . . is unconstitutional and deprives said defendants (in criminal proceedings) of their property without due process of law, and in violation of equal protection of the laws contrary to the 14th Amendment to the Constitution of the United States ... ." (A. 4-13; Rec. C-2—C-8).

On January 6, 1970, the Circuit Court of St. Clair County found the issues against the plaintiffs, and "particularly finds Section 110-7(f) of the Criminal Code proceedings is constitutional." (A. 22-23; Rec. C-18). A direct appeal was taken to the Supreme Court of Illinois (A. 24; Rec. C-20), and on October 7, 1970, the decision of the Trial Court was affirmed (A. 47-49; Rec. 9).

This appeal is from the aforementioned decision of the Supreme Court of the State of Illinois (A. 54; Rec. 16).

SUMMARY OF ARGUMENT

Section 110-7(f) of the Criminal Code of Illinois (Ill. Rev. Stat. 1963, Ch. 38, Par. 110-7(f)) (App. B, vi) imposes bail costs on those gaining pretrial release pursuant to the deposit of 10% of the full amount of bail (Sec. 110-7) (App. B, v-vii). No like costs are imposed on those gaining pretrial release on their individual recognizance (Sec. 110-2) (App. B, iii), or those depositing the full amount of bail in cash, stocks or bonds, or double the amount in real estate (Sec. 110-8) (App. B, vii-xi).

John Schilb, who paid costs pursuant to said statute, individually and on behalf of all persons similarly situate, submit that the cost imposition provision of Section 110-7(f) contravenes and violates the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, and respectfully pray the decision of the Supreme Court of Illinois, holding the imposition of said bail costs constitutional, be reversed for:

1. The imposition of the bail cost on only one segment of the class gaining pretrial release creates an "in-

vidious discrimination" by imposing a burden on this segment while imposing no similar burden on others gaining pretrial release. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966);

2. The imposition of the entire burden of supporting the Illinois Bail System on those persons gaining pretrial release who are least able to afford it—the poor and non-affluent (*Bandy* v. *U.S.*, 81 S. Ct. 197. (1966))—penalizes that segment in a quest for justice due to their lack of wealth, *Griffin* v. *Illinois* 351 U.S. 12 (1956); and,

3. The imposition of bail costs upon the innocent violates the most rudimentary concept of Due Process (*Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966).

ARGUMENT

THE IMPOSITION OF STATUTORY BAIL COSTS IN ILLINOIS CONTRAVENES AND VIOLATES THE DUE PROCESS AND EQUAL PROTECTION OF THE LAWS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In a climate of criticism and growing discontent with the operation of bail procedures in this country in the 1920's many public bodies, private foundations, and concerned individuals undertook bail studies which dealt in depth with needed reforms.[1] However, it was not until the early 1960's that any corrective legislation was enacted.

The Seventy Third General Assembly of the State of Illinois revised its bail procedure, in 1963, by enacting Article 110 of the Illinois Criminal Code (Ill. Rev. Stat. 1963, Ch. 38, Par. 110-1 *et seq.*) (App. B, iii-xiii) which provides for the pretrial release of an accused:

1. On his individual recognizance (Sec. 110-2) (App. B, iii);

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1. Pound, *Criminal Justice in Cleveland* (1924); Beeley, *The Bail System in Chicago* (1927); National Commission on Law Observance and Enforcement, Surveys Analysis 89 (1931); Weintraub, *Why in Kings County?* The Pleader 5-6 (March 1938); Administration of Bail in Philadelphia, 102 U. Pa. L. Rev. 1031 (1954); A Study of the Administration of Bail in New York City, 106 U. Pa. L. Rev. 685 (1958); Freed and Wald, *Bail in the United States* (1964).

2. By the deposit of 10% of the full amount of bail (Sec. 110-7) (App. B, v-vii);

3. By the deposit of cash, stocks or bonds in the full amount of bail, or pledging real estate in double the amount of bail (Sec. 110-8) (App. B, vii-xi).

In addition, Article 110 imposes a bail cost (Sec. 110-7(f)) "to cover costs of handling bail costs and deposits"[2] upon those released under Section 110-7, but imposes no like costs upon those released under either Sections 110-2 or 110-8.

Illinois does not afford General Assembly reports or hearings, compiled or conducted, preliminary to the enactment of legislation. However, the reasons for the passage of Article 110 can in part be deduced from the Congressional Record relative to similar bills which were eventually enacted into law as the Bail Reform Act of 1966 (18 U.S.C. 3141-3152).

Certain bills (S 2838, S 2839, S 2840) were introduced into the Eighty Eighth Congress (1964), which were the Federal counterpart of Article 110. Senate Bill 2840 (App. C, xiv-xvi) provided for the retention of 10% of the 10% of cash deposit exactly as does Section 110-7(f) of the Illinois Criminal Code. These bills were retained in Committee and the principles thereof were resubmitted in the Eighty Ninth Congress (1965) as S 646, S 647, S 648, and finally S 1357 as an expanded and omnibus bail reform bill.

Senate Bill 1357 embodied all of the substance of Article 110 of the Illinois Criminal Code—with one significant exception—that bill removed the 10% retention of the

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2. Committee Comments, 1963 (Ill. S.H.A., Ch. 38, Sec. 110-7, p. 316).

cash deposit to defray bail bond costs (18 U.S.C. 3146(a)(3)). Thus, under S 1357 bail costs were not to be imposed on anyone gaining pretrial freedom.

The purposes for the passage of S 1357 are enumerated within the Bill itself (Vol. 112, Con. Rec., Eighty Ninth Congress, 2d Session, pp. 12499, 12500):

"FINDINGS AND PURPOSE

Sec. 2 (a) The Congress finds that—

(1) Present Federal bail practices are repugnant to the spirit of the Constitution and dilute the basic tenets that a person is presumed innocent until proven guilty by a court of law and that justice should be equal and accessible to all;

(2) Persons reasonably expected to appear at future proceedings should not be deprived of their liberty solely because of their financial inability to post bail;

(3) Respect for law and order is diminished when the attainment of pretrial liberty depends solely upon the financial status of an accused;

(4) Bail practices which rely primarily on financial consideration inevitably disadvantage persons and families of limited means;

(5) The high costs of unnecessary detention impose a severe financial burden on the taxpayers and deplete public funds which could be better used for other public purposes;

(6) Family and community ties, a job, residence in the community, and the absence of a substantial criminal record, are factors more likely to assure the appearance of a person than the posting of bail; and

(7) Accused persons should not be unnecessarily detained and subjected to the influence of persons convicted of crimes and the effects of jail life; nor

should their families suffer needless public derision and loss of support.

(b) The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest."

These findings and purpose for the passage of the Bail Reform Act of 1966 are confirmed and fortified by the comments, articles and disertations contained in the Congressional Record. (Vol. 112, Eighty Ninth Congress, 2d Session, pp. 12488-12504).

It may be assumed that similar considerations led the Seventy Third General Assembly of the State of Illinois to enact Article 110 of the Criminal Code. However, in so doing the legislature created an anomaly in law for it burdened one segment of the class gaining pretrial release with the cost of supporting the administration of the Illinois bail system.

The imposition of this bail cost upon those depositing 10% of bail under Section 110-7(f) is unconstitutional for it contravenes and violates the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, for:

A.) It imposes bail costs on only one segment of the class gaining pretrial release;

B.) It imposes bail costs on the poor and non-affluent while no like costs are imposed on the rich and affluent;

C.) It imposes bail costs on the innocent.

A.

The Imposition Of Bail Costs On Only One Segment Of The Class Gaining Pretrial Release Contravenes And Violates The Equal Protection Of The Laws Clause Of The Fourteenth Amendment To The Constitution Of The United States.

The Illinois General Assembly imposes the entire burden of defraying the administration of bail bonds and deposits solely upon those who gain their pretrial release by depositing 10% of bail pursuant to Section 110-7 of the Illinois Criminal Code (App. B, v-vii).

No like costs are imposed on those released on their individual recognizance (Sec. 110-2) (App. B, iii) or those depositing the full amount of bail, stocks or bonds, or pledging real estate in double the amount of bail (Sec. 110-8) (App. B, vii-xi). There are by necessity; however, costs of administration attendant to each method of release; for as the defendants have stipulated "The actual cost of administering the provisions of Section 110-7 and 110-8 are substantially the same, but there may probably be a slightly greater cost of Section 110-8" (A. 21-22; Rec. C-17).

All who are accused of a crime and gain release from pretrial custody, under any of the aforementioned provisions, are rendered a service by the Clerk of the Court.

The imposition of bail costs on only one segment of that class, rendered a service by the Clerk, is in direct conflict with the decision of this Court in *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966).

In *Rinaldi,* New Jersey, by statute, afforded all unable to purchase a transcript of their criminal trials, a free transcript for the purpose of appeal. New Jersey law

further provided that one incarcerated in the penitentiary after the affirmance of his conviction was required to repay the cost of said transcript. No corresponding burden of repayment was imposed on parolees, probationers or those given a suspended sentence. It should be noted, additionally, though not raised in *Rinaldi,* the New Jersey statute made no provision for the imposition of costs on a successful appellant (N.J.S.A. 2A: 152-18).

In holding that the New Jersey statute created an "invidious discrimination," this Court stated in *Rinaldi.* (p. 308):

> "The New Jersey law does not impose this financial burden upon all who have been convicted in its courts and whose appeals have been unsuccessful. It requires no repayment at all from a man who has received a suspended sentence or been placed on probation, regardless of how high his subsequent earnings may be. It requires no repayment at all from an unsuccessful appellant who has been sentenced only to pay a fine. Instead, the law fastens the duty of repayment only upon a single class of unsuccessful appellants—those who are confined in institutions. We find that the discriminatory classification imposed by this law violates the requirements of the Equal Protection Clause."

Likewise, the Illinois law does not impose the financial burden of bail costs on all who have been admitted to bail. It requires no payment at all from a man released on his individual recognizance (Sec. 110-2) or from a man who has posted the full amount of cash, stocks or bonds, or double the amount in real estate (Sec. 110-8). Instead, the law fastens the duty of payment upon a single segment of the class gaining pretrial release—those who utilize Section 110-7—and thus creates an equally invidious discrimination in violation of the requirements of the Equal Protection Clause.

The cost retention provision of Section 110-7(f) is therefore unconstitutional and must fall.

B.

The Imposition Of Bail Costs On The Poor And Non-Affluent While No Like Costs Are Imposed On The Rich And Affluent Contravenes And Violates The Due Process And Equal Protection Of The Laws Clauses Of The Fourteenth Amendment To The Constitution Of The United States.

This Court has consistently held that a person cannot be penalized in a quest for justice due to a lack of wealth. *Griffin* v. *Illinois,* 351 U.S. 12 (1956); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Douglas* v. *Green,* 363 U.S. 192 (1960); *Pointer* v. *Texas,* 380 U.S. 400 (1965); *Douglas* v. *California,* 372 U.S. 353 (1963); *Coppedge* v. *U.S.,* 369 U.S. 438 (1962); and *Milani* v. *Illinois,* 386 U.S. 12 (1967).

In relation to the *Griffin* doctrine, Mr. Justice Douglas in *Bandy* v. *U.S.,* 81 S. Ct., 197 (1960) (bail application) made it eminently clear that when discussing "richman-poorman", the poor man is not necessarily destitute, but rather, a man without "enough property to pledge for his freedom."

This concept was recognized by former Chief Justice Warren, who stated in relation to the proposed Bail Reform Act of 1966 (National Conference on Bail and Criminal Justice, May 27, 1964, pp. 12-13):

> "The proposed bills recognize that poverty is a relative concept and that the poverty of the accused must be measured in each case by reference to the particular need or service under consideration."

Poverty, therefore, in relation to bail, is merely whether one possesses sufficient assets to meet the bond set by the Court.

"A vast majority of our criminal defendants are indigent by an reasonable definition". (District of Columbia Bail Project—Georgetown Law Journal, Vol. 53, No. 3, Spring 1965, p. 679), and authority establishes that as the amount of bail increases the percentage of those able to obtain pretrial release significantly decreases.[3] As

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3. District of Columbia Bail Project—Georgetown Law Journal, Vol. 53, No. 3, Spring 1965, p. 684;

POSTING BOND

"Table II demonstrates the decreasing ability of defendants to post bond as bail amounts increase. While 57 per cent of those defendants whose bonds were set at $1,000 or less were able to post bond, only 12 per cent of those whose bonds were set at $5,000 or more were similarly able to obtain release. Table III, the ability to post bond by offense category, is presented as a further illustration of this point.

TABLE II

PERCENTAGE OF DEFENDANTS POSTING ORIGINAL BONDS BY AMOUNT

Bail Amounts	Number of Cases Bail Set	Percentage Posting Bail
$500 and under	130	74%
$600-$1,000	796	54%
$1,500	143	43%
$2,000	188	34%
$2,500	212	35%
$3,000	78	21%
$3,500-$4,500	49	22%
$5,000	186	16%
$7,500	23	4%
$10,000 & over	58	3%
Total	1,863	42%"

Justice Thomas E. Kluczynski and Justice Walter V. Schaefer, in their dissent in the instant case stated (A. 45; Rec. 8): "This Court must take judicial notice of the fact many defendants cannot afford to pay the full amount of bail." Accord.[4]

It was this concept of relative poverty which led to the passage of the Federal Bail Reform Act of 1966, and Article 110 of the Illinois Criminal Code. These statutory provisions enable those unable to afford the full amount of bail to exercise their right to pretrial freedom (*Stack* v. *Boyle*, 342 U.S. 1 (1951)), by depositing 10% of the full amount of bail.

Since many defendants in criminal cases simply lack "enough property" to deposit the full amount of bail, they have "no choice" but to deposit 10% or remain incarcerated and suffer the pitfalls attendant thereto. *Bandy* v. *U.S.*, 81 S. Ct. 197 (1960). Accord.[5]

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4. Bail Reform Act of 1966 (18 U.S.C. 3141-3152); Congressional Record (Vol. 112, Con. Rec. 89th Congress, Second Session pp. 12488-12505); S.H.A. Ch. 38, Sec. 110, Committee Comments; Attorney General's Committee on Poverty and the Administration of Criminal Judicial Procedure (U.S.C. Cong. and Admin. News 1966); National Conference on Bail and Criminal Justice, May 27, 1964.

5. Attorney General's Committee on Poverty and the Administration of Criminal Judicial Procedure, stated (U.S.C. Cong. and Admin. News, 1966, p. 2299): ". . . Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with family, his attitude toward social justice, the outcome of the trial and the severity of the sentence . . ."

Upon these non-affluent, Illinois imposes a bail cost (Sec. 110-7(f)). No like cost is imposed by the Federal Act (18 U.S.C. 3146 (a)(3)). In addition, Illinois imposes no bail costs on the rich or affluent who can afford the full amount of bail (Sec. 110-8). Thus, those least able to afford it, the poor and non-affluent, who have no choice but to remain in jail or deposit 10% of bail, are unconstitutionally "penalized in a quest for justice due to a lack of wealth." *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

C.

The Imposition Of Bail Costs On An Innocent Accused Contravenes And Violates The Due Process Clause Of The Fourteenth Amendment To The Constitution Of The United States.

Perhaps the most disconcerting aspect of the imposition of bail costs pursuant to Section 110-7(f) of the Illinois Criminal Code (App. B, vi) is that these costs are imposed upon an innocent person accused of a crime; who is put to the expense, disgrace and anguish of a trial and then found not guilty. He is then assessed a cost for exercising his right to release pending trial.

Ironically, one who gains pretrial release under Sections 110-2 (App. B, iii) or 110-8 (App. B, vii-xi) and is found guilty is burdened with no cost whatsoever.

In *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966) costs were assessed by the jury against a defendant, who was acquitted of a misdemeanor, pursuant to a Pennsylvania statute. This Court held that the statute was so vague as to violate the due process clause of the Fourteenth Amendment.

In the case at bar we do not have a vague statute. Rather it is explicit in the Illinois statute that the burden

to support the entire administration of the bail bond system in Illinois falls on those released pursuant to Section 110-7 of the Illinois Criminal Code—whether guilty or innocent.

In *Giaccio,* Mr. Justice Stewart, in concurring with the majority opinion of the Court, stated (p. 405):

> ". . . In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the must rudimentary concept of due process of law."

Mr. Justice Fortas concurred for the same reason.

It is submitted that the principle enunciated in the aforementioned concurring opinions is the only reasonable application of the Constitution of the United States in relation to the present cause.

The exact nature of the cost imposed upon the acquitted defendant in *Giaccio* v. *Pennsylvania,* 382 U.S. 399, is not apparent from the opinion. However, if there is any question as to whether the bail cost imposed on innocent defendants in the State of Illinois are costs attendant to a criminal proceeding, one need but note the statement from the Attorney General's Committee on Poverty and the Administration of Criminal Justice Procedure Report, (U.S. Cong. and Admin. News, 1966, p. 2299):

> "The present system of monetary bail would be adequate if all could afford it. The facts, however, are to the contrary. The rich man and the professional criminal readily raise bail regardless of the amount. But it is the poor man, lacking sufficient funds, who remains incarcerated prior to trial. But the mere incarceration is not the only evil effect of the monetary

> bail system. Studies have shown that failure to release has other adverse effects upon the accused's preparation for trial, retention of employment, relations with his family, his attitude toward social justice, the outcome of the trial, and the severity of the sentence. For example, in preparation for his trial, the defendant who remains in jail does not have the same access to his counsel as the man free on bail. He is limited in his ability to collect witnesses for his defense. Often, he loses his employment, his family may become the subjects of welfare payments, and in many instances in the Federal system he becomes a financial burden to the Federal Government in that the Federal Government reimbureses local authorities when a defendant is incarcerated in a local jail."

Thus, pretrial release is not only an integral element of criminal justice, but perhaps the most important element, and any costs imposed upon the exercise of the right to bail is a cost attendant to the criminal proceedinf, and cannot constitutionally be imposed on an innocent accused.

CONCLUSION

John Schilb, individually and on behalf of all persons similarly situate, plaintiffs-appellants, have herein established that the statutory imposition of bail costs in Illinois contravenes and is in violation of the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, and respectfully pray the decision of the Supreme Court of the State of Illinois be reversed.

Respectfully submitted,

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APPENDIX A

Amendment XIV

Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts in curred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX B

ARTICLE 110. BAIL

110—1. § 110-1. **Definitions.)** (a) "Security" is that which is required to be pledged to insure the payment of bail.

(b) "Surety" is one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all conditions of the bail bond.

110—2. § 110-2. **Release on Own Recognizance.)** When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32—10 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with sub-section (g) of Section 110—7 of this Code.

This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.

110—3. § 110-3. **Issuance of Warrant.)** Upon failure to comply with any condition of a bail bond or recognizance the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or his own recognizance.

110—4. § 110-4. **Bailable Offenses.)** (a) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense.

(b) A person charged with an offense for which death is a possible punishment has the burden of proof that he should be admitted o bail.

110—5. § 110-5. **Determining the Amount of Bail.)** (a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused.

(6) When a person is charged with an offense punishable by fine only the amount of the bail shall not exceed double the amount of the maximum penalty.

(c) When a person has been convicted of an offense and only a fine has been imposed the amount of the bail shall not exceed double the amount of the fine.

110—6. § 110-6. **Reduction or Increase of Bail.)**

(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond.

(b) Reasonable notice of such application by the defendant shall be given to the State.

(c) Reasonable notice of such application by the State shall be given to the defendant, except as provided in subsection (d).

(d) Upon verified application by the State stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order authorized by subsection (a).

110—7. § 110-7. **Deposit of Bail Security.)**

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing

or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last know address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to

the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

110—8. § 110-8. **Cash, Stocks, Bond and Real Estate as Security for Bail.)** (a) In lieu of the bail deposit provided for in Section 110—7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

(2) By real estate situated in this State with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

b) If the bail bond is secured by cash or stocks and bonds the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified;

(2) The market value of each stock and bond;

(3) The total market value of the stocks and bonds listed;

(4) A statement that the affinat is the sole owner of the stocks and bonds listed and they are not exempt from execution;

(5) A statement that such stocks and bonds have not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that such stocks and bonds are security for the appearance of the accused in accordance with the conditions of the bail bond.

(c) If the bail bond is secured by real estate the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A legal description of the real estate;

(2) A description of any and all encumbrances on the real estate including the amount of each and the holder thereof;

(3) The market value of the unencumbered equity owned by the affiant;

(4) A statement that the affiant is the sole owner of such unencumbered equity and that it is not exempt from execution;

(5) A statement that the real estate has not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that the retl estate is security for the appearance of the accused in accordance with the conditions of the bail bond.

(d) The sworn schedule shall constitute a material part of the bail bond. The affiant commits perjury if in the sworn schedule he makes a false statement which he does not believe to be true. He shall be prosecuted and punished accordingly, or, he may be punished for contempt.

(e) A certified copy of the bail bond and schedule of real estate shall be filed immediately by the court in the office of the registrar of titles or recorder of deeds of the county in which the real estate is situated and the State shall have a lien on such real estate from the time such copies are filed in the office of the registrar of titles or recorder of deeds. The registrar of titles or recorder of deeds shall enter, index and record (or register as the case may be) such bail bonds and schedules without requiring any advance fee, which fee shall be taxed as costs in the proceeding and paid out of such costs when collected.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days

from the date of the forefeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused and his sureties for the amount of the bail and costs of the proceedings.

(h) When judgment is entered in favor of the State on any bail bond the State's Attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the cash, stocks or bonds deposited with the clerk of the court and the real estate described in the bail bond schedule. The cash shall be used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The stocks, bonds and real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisfy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The balance shall be returned to the owier. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

(i) No stocks, bonds or real estate may be used or accepted as bail bond security in this State more than once in any 12 month period. As amended by act approved July 31, 1967. L. 1967, p. ——, H.B. No. 862.

110—9. § 110-9. **Taking of Bail by Peace Officer.)** When bail has been set by a judicial officer for a particular offense or offender any sheriff or other peace officer may take bail in accordance with the provisions of Section 110—7 or 110—8 of this Code and release the offender to appearance in accordance with the conditions of the bail bond, the Notice to Appear or the Summons. The officer shall give a receipt to the offender for the bail so taken and within a reasonable time deposit such bail so taken and within a reasonable time deposit such bail with the clerk of the court having jurisdiction of the offense.

110—10. § 110-10. **Conditions of Bail Bond.)** (a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will:

(1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;

(2) Submit himself to the orders and process of the court; and

(3) Not depart this State without leave.

(b) If the defendant is admitted to bail after conviction the conditions of the bail bond shall be that he will:

(1) Duly prosecute his appeal;

(2) Appear at such time and place as the court may direct;

(3) Not depart this State without leave of the court and

(4) If the judgment is affirmed or the cause reversed and remanded for a new trial, forthwith surrender to the officer from whose custody he was bailed.

110—11. § 110-11. **Bail on a New Trial.)** If the judgment of conviction is reversed and the cause remanded for a new trial the trial court may order that the bail stand pending such trial, or reduce or increase bail.

110—12. § 110-12. **Notice of Change of Address.)** A person who has been admitted to bail shall give written notice to the clerk of the court before which the proceeding is pending of any change in his address within 24 hours after such change.

110—13. § 110-13. **Persons Prohibited from Furnishing Bail Security.)** No attorney at law practicing in this State and no official authorized to admit another to bail or to accept bail shall furnish any part of any security for bail in any criminal action or any proceeding nor shall any such person act as surety for any accused admitted to bail.

110—14. § 110-14. **Credit for Incarceration on Bailable Offense.)** Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

110—15. § 110-15. **Applicability of Provisions for Giving and Taking Bail.)** The provisions of Sections 110-7 and 110-8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail. In all cases where a person is admitted to bail the provisions of Section 110-7 and 110-8 of this Code shall be applicable.

However, the Supreme Court may, by rule or order, prescribe a uniform schedule of amounts of bail in specified traffic and conservation cases, quasi-criminal offenses, and misdemeanors. Such uniform schedule may provide that the cash deposit provisions of Section 110-7 shall not apply to bail amounts established for alleged violations punishable by the fine alone, and the schedule may further provide that in specified traffic cases a valid Illinois chauffeur's or operator's license must be deposited, in addition to 10% of the amount of the bail specified in the schedule. As amended by act approved Aug. 14, 1967. L. 1967, p. ——, S.B. No. 1168.

APPENDIX C

88th CONGRESS
2d Session

.....S. 2840.....

IN THE SENATE OF THE UNITED STATES
May 14 (legislative day, March 30), 1964

Mr. Ervin (for himself Mr. Hruska, Mr. Fong, Mr. Bayh, Mr. Williams of New Jersey, and Mr. Johnson) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

A BILL

To further implement the constitutional right to bail by permitting persons admitted o bail to make a cash deposit with the court in lieu of providing securities or other collateral security.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 207 of title 18, United States Code, is amended by adding at the end thereof a new section as follows:

"**§3147. Cash deposit**

"(a) Whenever the amount of bail has been fixed in the case of any person charged with an offense against the United States, such person shall execute a bond for his appearance, and, in lieu of providing other collateral security or sureties, may deposit in the registry of the court a sum equal to 10 per centum of the amount of bail

so fixed. Upon the deposit of such sum such person shall be released from custody subject to the conditions of this bond.

"(b) If there is no breach of condition of a bond given by any person as provided in subsection (a), the court shall release such person from the obligation of the bond, but shall retain 10 per centum of the sum deposited by such person to defray bail bond costs. The balance of such deposit shall, no judgment for court costs and/or fine being entered against such person, be returned to him. In the event judgment for court costs and/or fine is entered against such person, the balance of such deposit shall be first applied to the payment of such judgment.

"(c) If there is a breach of condition of a bond given by any person as provided in subsection (a), the court shall declare a forfeiture of the full amount of the bail fixed in the case of such person. Notice of the forfeiture shall be mailed to such person at his last known address, and, if such person does not appear as required within thirty days after the mailing of such notice and the forfeiture is not set aside by the court, the court shall render judgment of default against such person in the full amount of the bail. The court may direct that any such forfeiture be set aside if, under all the circumstances, it appears that justice does not require the enforcement thereof. Any judgment of default against such person shall be enforced by all available processes of the court, and the amount deposited by such person in the registry of the court shall be applied to the payment of costs and the balance thereof shall be applied to the judgment.

"(d) Nothing in this section shall limit in any way the application of section 3146 of this title to any person."

(b) The analysis of chapter 207 of title 18, United States Code, is amended by inserting at the end thereof the following:

"3147. Cash deposit."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-90
(Formerly No. 1412, O.T. 1970)

JOHN SCHILB, et. al.,

Plaintiffs-Appellants.

VS.

VINCENT P. KUEBEL, Clerk of the Circuit Court of St. Clair County, Illinois, et. al.,

Defendants-Appellees.

Appeal from the Supreme Court of Illinois

BRIEF FOR APPELLEES

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Illinois are reported at 46 Ill. 2d 538, 264 N.E. 2d 377 and at pp. 30-47 of the Appendix filed in this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Since these provisions are lengthy, they are only cited here. The full text of the provisions are printed in Appendix A to this brief.

UNITED STATES CONSTITUTION, AMENDMENT FOURTEEN.

Article 110 of the Illinois Code of Criminal Procedure (Ill. S.H.A., Bail, Ch. 38, Par. 110, et seq.)

United States Code, Title 18, Sec. 3146, Release in non-capital cases prior to trial.

STATEMENT OF THE CASE

The statement of the case contained in the Brief of the Appellants is correct, but omits these facts: That the named plaintiff never has alleged that he is indigent and that he did not apply for a release on his own recognizance.

SUMMARY OF ARGUMENT

The Illinois statutes regulating bail do not violate the Equal Protection Clause of the Fourteenth Amendment. Release, upon deposit of 10 per cent of the set bail, is a statutory right which, if exercised, grants a substantial benefit to an accused person. In return for the benefit granted and in view of the laudable purposes sought to be accomplished by the implementation of this reform legislation, the distinction created by the Illinois bail provisions are reasonable. Moreover, the 10 per cent deposit provision has been successful in its primary objective—

elimination of professional bondsmen from the bail system.

Further, the 10 per cent deposit provision does not discriminate against the poor. In fact, the statute not only lessens the inherent inequality between rich and poor in making bail, but it is good economic sense for rich and poor alike to utilize the 10 per cent deposit provision.

Finally, the 10 per cent deposit provision does not violate substantive due process. The percentage of the deposit retained by the clerk is an administrative charge. It is not a reimbursement for the cost of prosecution. The fact that the Federal government finances its bail system without like imposition of costs is not conclusive. The Illinois and Federal attempts at bail reform may both be constitutional.

ARGUMENT

INTRODUCTION

In 1954, pursuant to a suggestion of the Supreme Court of Illinois, the Illinois State and Chicago Bar Associations appointed a Joint Committee to Revise the Illinois Criminal Code. As a result of the work of this Committee, a substantive code of criminal law was adopted by the Illinois General Assembly, signed by the Governor, and became effective January 1, 1962.

With this first phase completed, the Committee turned its attention to the second phase of its original charge: drafting a new Code of Criminal Procedure. On January 1, 1964, the Committee's work reached fruition; the new Illinois Code of Criminal Procedure went into effect.

Article 110 of the Code of Criminal Procedure governs bail in criminal cases.[1] Beyond gathering all bail provisions into one section of the Illinois Statutes, the new provisions made substantive changes. One of these substantive changes is the basis for plaintiff, Schilb's, action.

The statutes under attack are set forth in Appendix A of this brief. In summary, they provide that an accused may receive pretrial release in one of three ways.

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1. Schilb was arrested for two traffic offenses. On petition for rehearing to the Supreme Court of Illinois, Schilb argued that Rule 526 of the rules of the Supreme Court of Illinois governed bail in certain minor traffic offenses. Since the petition for rehearing was denied without comment, we must assume the Supreme Conrt of Illinois decided that Article 110-7 of the Code of Criminal Procedure was correctly utilized in Schilb's situation.

1. An accused may be released on his own recognizance (Sec. 110-2). This section is to be liberally construed to effectuate the purpose of relying on criminal sanctions[2] instead of financial loss to assure the appearance of the accused.

2. An accused may deposit 10 per cent of the full amount of the bail. (Sec. 110-7.) When bail is made in this way, the clerk of the court shall retain as bail bond costs 10 per cent of the amount deposited by the accused. The remainder of the amount deposited is later applied to the payment of a judgment or returned to the accused.

3. In lieu of the 10 per cent bail deposit provided for above, the accused may secure an amount equal to the required bail of cash or stocks and bonds, or, in the alternative, secure double the amount of the required bail in unencumbered real estate (Sec. 110-8). If bail is made under this section, the clerk of court later refunds the entire amount secured to the accused, after deducting costs of a judgment, if any.

In determining the amount of the bail, the court is not bound to a fixed standard. However, Section 110-5 of the Code of Criminal Procedure sets out considerations which must be taken into account. These considerations were meant to be a codification of the present law. Moreover, provision is made for reduction of the bail bond. (Sec. 110-6.)

While Illinois does not compile reports of proceedings preliminary to the passage of a bill, there are clear indications of the reasoning involved in the above changes.

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2. As part of the general revision of the Criminal Code, bail jumping was made a separate criminal offense. Section 32-10 of the Criminal Code of 1961 (Ill. S.H.A., Ch. 38, Par. 32-10.)

The statutes, as adopted by the legislature, included almost verbatim the proposed bill of the Joint Committee to Revise the Illinois Criminal Code. The Committee Comments[3] set out the underlying premises. Moreover, the Chairman of the Committee explained the new provisions, especially the 10 per cent deposit provision, in a seminar and article.[4]

The Committee started with the fundamental principle underlying the granting of bail—a person accused of crime is presumed to be innocent until he is proven guilty beyond all reasonable doubt at trial. It took note that the practice of requiring a bond with sureties is premised upon the assumption that personal or family pecuniary loss will deter non-appearance. However, in modern practice it is not the accused, his family or friends who make the bond and suffer the loss for non-appearance, but professional bondsmen and insurance companies.

For years it had been recognized by common consent that a major evil in the American administration of justice was the professional bail bondsman.[5] Some of the more common abuses were overcharges of bail fees, taking security pledges and failing to return them to the owner and collecting money reimbursements for forfeited bond judgments which were later vacated.[6] Moreover, the al-

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3. Committee Comments, 1963 (Ill. S.H.A., Ch. 38, Par. 110 et seq., p. 298 et. seq.)

4. Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 Ill. Law Forum 35.

5. Beeley, The Bail System in Chicago, p. 39 (1927).

6. Freed and Wald, Bail in the United States: 1964, p. 34 (1964).

leged value of a bondsman being responsible for the appearance of an accused and tracking him down and returning him at the bondsman's expense is illusory. The great majority of bail jumpers are apprehended by the police.[7]

The bail bondsmen, not the judge or the accused, held the keys to the jail. They determined for whom they would act as surety—who in their judgment was a good risk. Not only defendants who were unable to pay the bondsmen's fees remained in jail. The bad risks who were able to pay the bondsmen's fee—but not the full amount of the bail also remained in jail.

Prior to 1963, the system for making bail worked as follows: Bail would be set for an accused. If the accused or his family could secure the full amount of the bail, the accused would be released. If the accused or his family could not secure the full amount of the bail, the professional bail bondsman would enter the picture.[8] The professional bondsman would secure the full amount of bail for a price.[9] The going rate in Illinois in 1963 was the

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7. Committee Comments, 1963 (Ill. S.H.A., Ch. 38, Par. 110 et seq., p. 300).

8. In practice, he would be lurking in or about the courtroom or police station. See R. Goldfarb, Ransom, p. 92-126 (1965) for a complete discussion of the evil practices of bailbondsmen.

9. This could be done by the bondsmen simply signing a power of attorney on their bonds. Now bailbondsmen are prohibited from utilizing the 10 per cent deposit section, and they find it unecomomical to encumber one hundred per cent of the bond in cash or securities or double the amount of the bond in real estate. Boyle, Bail under the Judicial Article, 17 De Paul Law Review 267, 273 (1968).

statutory maximum—10 per cent of the amount of the bail. No refund of this 10 per cent was made by the surety to the accused for his routine compliance with the conditions of his bond.[10]

The 10 per cent bail deposit has completely replaced the bond writing activities of professional bondsmen. In 1966, no professional bonds were written for the Municipal Court of Chicago.[11] In some downstate counties of Illinois, no professional bonds have been written since the new provisions went into effect in 1963. More importantly, it appears that the 10 per cent system has had two additional positive effects. First, the bail forfeiture rate has decreased. Second, the jail population—at least before the astounding increase in the crime rate—has been reduced.[12]

As Professor Bowman, Chairman of the Joint Committee to Revise the Illinois Criminal Code, stated in a seminar on the product of his Committee:

> "It is certainly true, as stated yesterday by Mr. Wright, that the 10 per cent provision in Illinois and the Vera Foundation type investigative project are not the answer to the bail problems of the indigent and the serious offender. It was not anticipated in either case that they would be. However, experience in New York under that Vera project, and experience in Illinois under the 10 per cent provision prove that both are effective in their respective areas—the Vera type investigation aids the indigent in securing release, and the Illinois 10 per cent provision reduces the cost of liberty to those who can afford 10 per cent to a bondsman or to the clerk." (1965 Univ. of Ill. Law Forum, at 40).

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10. A. Kamin, Bail Administration in Illinois, 53 Ill. Bar Journal, 674, 678 (1965).

11. Boyle, supra note 9, at 274.

12. Bowman, supra note 4, at 35-40; Boyle, supra note 9, at 274-275.

I.

IMPOSITION OF A FEE ONLY AGAINST THOSE WHO OBTAIN PRE-TRIAL RELEASE BY DEPOSITING 10 PER CENT OF THE AMOUNT OF A REASONABLE BOND DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In Illinois, accused persons who are released on their own recognizance pay no fee for the processing of their bonds. Those who are released upon deposit of 100 per cent of the amount of the bail in cash or stocks or 200 per cent of the amount of the bail in real estate pay no fee for the processing of their bonds. To do so would be a violation of substantive due process for the State would be conditioning the exercise of a constitutional right upon the payment of a fee. See: *Boddie* v. *Connecticut*, —— U.S. ——, 28 LEd 2d 113, 116, 117 (1971).

An accused may also secure release in Illinois by depositing 10 per cent of the amount of the bail with the clerk of the court. If this method is utilized, when the conditions of the bond have been fulfilled, the clerk will retain, as costs of processing the bond, 10 per cent of the amount deposited (or 1 per cent of the amount of the set bail). The retention of a portion of the amount deposited does not result in a conditioning of the exercise of a constitutional right upon the payment of a tax, however. The constitutional right is to secure release upon the payment of a reasonable amount of bail. The

Constitution does not require release upon the payment of a portion of a reasonable amount of bail.[13]

In this case Illinois has released an accused for substantially less than what the Constitution permits and a judge has found reasonable. Plaintiff has not exercised his constitutional right to freedom upon the payment of a reasonable amount of bail. He has exercised a statutory right to release at 10 per cent of the Constitutional requirement. Therefore, plaintiff is in a radically different position from a person who has exercised his constitutional right to bail.

In *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966), this Court held that financial burdens could not be imposed on one class of appellants—unsuccessful appellants who are confined in institutions—as opposed to all other classes of appellants. A New Jersey statute required this single class of unsuccessful appellants to reimburse the state for the cost of a transcript of the trial court proceedings. This Court found that all appellants received the same benefit—a verbatim transcript—and there was no defensible State interest which could be served by focusing on whether an appellant had been sentenced to a term in jail or merely fined. 384 U.S. 309.

In this case the person utilizing the 10 per cent system receives a substantially different benefit than the person depositing the full amount. For example, A and

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13. Plaintiff does not allege that the amount of the set bail in this case is unreasonable. In the absence of such allegation, it must be assumed that the amount of the set bail was constitutional. Illinois provides for a method to reduce bail. Section 110-6, Illinois Code of Criminal Procedure. Plaintiff in this action did not make a motion to reduce the amount of the bail.

B are both similarly situated. Reasonable bail has been set for both at $1,000. Both own no stock or real estate. Both can secure $100 as bail but are unable to deposit the full amount—$1,000. Both will later be found innocent of the charges brought against them. A elects to seek release by utilizing the 10 per cent deposit provision. B chooses not to use the provision.

A receives substantial benefits which are not afforded to B. A will be released at 10 per cent of what is a reasonable bond. B is faced with a dilemma. He may sit in jail pending a determination of his case. Or, if he decides to exercise his constitutional right, he will have to make bail through a professional bailbondsman. The professional bondsman will retain as a bail fee the *entier* $100.[14] That amount will not be returned to B. It is his price for exercising a constitutional right. A, however, in addition to being allowed release at less than his constitutional right will have $90 returned to him. He has been granted

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14. 10 per cent was the maximum bailbondsmen could charge under Illinois law when the 10 per cent provision went into effect. As is often the case, the maximum was the going rate. That provision is still in effect. Ch. 16, Par. 62(d), Ill. Rev. Stat. (1969). However, bailbondsmen have found it uneconomical to write bonds in criminal cases since the Supreme Court of Illinois in *People ex. rel. Gendron* v. *Ingram*, 34 Ill. 2d 623 (1966) ruled that deposit of the amount of security must be made to the clerk of the court even though a surety company has adequate securities on deposit with the State Director of Insurance. See Boyle, Bail Under the Judicial Article, 17 De Paul Law Review 267, 273, 274 (1968). As a practical matter, B would be unable to obtain release by pledging the full amount of the bail. He would sit in jail until found innocent.

substantial benefits by utilizing the 10 per cent deposit system.

As this Court stated in *Rinaldi* v. *Yeager* at 384 U.S. 309:

> "To be sure, the constitutional demand (Equal Protection) is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' (Citation.) Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have some relevance to the purpose for which the classification is made." (Insertion for clarity.)

The 10 per cent deposit system was not intended to secure pre-trial release for all defendants. It was intended to reduce the power of the bailbondsmen in the bail process and to diminish the financial burden on those who were forced to seek release through the professional bailbondsman. Sec. 110-7 imposes a special burden upon those who utilize it. However, in light of the obvious relevance to those laudable purposes, the classification system must be found reasonable.

The legislature intended to give the moderately poor an opportunity for release which was not previously available—and at a cost (special burden) far below the then prevailing rate. A cost which rewards compliance by refunding 90 per cent of the deposit. This is in marked contrast to the old system which doubly penalized moderately poor defendants who complied with the conditions of their bond. They (1) paid an exorbitant bond fee, often more than the 10 per cent legal limit, and, (2) they

received nothing back when they complied by appearing in court.

All sound social, economic and political (in the classic sense of the word) factors being considered, the classification system is reasonable.

II.

THE ILLINOIS BAIL DEPOSIT PROVISIONS WERE NOT INTENDED TO BENEFIT THE TRULY INDIGENT. IN PRACTICE, THEY DO NOT CREATE CLASSES, BUT ATTEMPT TO ALLEVIATE PROBLEMS IN THE CLASSES WHICH WERE EXISTING AT THE TIME THEY WERE ADOPTED.

"The amount of bond shall be . . . (5) considerate of the financial ability of the accused." Section 110-5, Illinois Code of Criminal Procedure (Ill. S.H.A. Ch. 38, Par. 110-5).

In setting the amount of the bail, a judge should take into account many factors. The fixing of bail for any individual defendant must be based upon standards relevant to the basic purpose of assuring the presence of that defendant on his designated court date. *Stack* v. *Boyle*, 342 U.S. 1, 342 U.S. 1 (1951). Financial ability to make the set bail is only one of the considerations—albeit a quite important one. Inability to make bail has consequences in excess of denial of freedom.[15] However, this Court has held that mere inability to make the set bail does not mean the set bail is excessive. *Hodgson* v. *U.S.*, 365 F. 2d 679, 687 (8th Cir. 1966), cert. denied 385 U.S.

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15. See La Fave, Alternatives to the Present Bail System, 1965 Ill. Law Forum 8, 10-11.

1029 (1967); *U. S.* v. *Radford,* 361 F. 2d 777, 781 (4th Cir. 1966) cert. denied 385 U.S. 877 (1967).

Yet in the case of an indigent defendant, the fixing of bail in even a modest amount may have the practical effect of denying him release. *Bandy* v. *U.S.*, 81 S. Ct. 197, 5LEd 2d 218, 219 (1960).[16]

Plaintiff alleges that the Illinois bail provisions discriminate against indigent defendants. On their face, the provisions do not discriminate against poor people. In practice, such is not the case any more than it is the case without a 10 per cent provision. Moreover, if this Court finds the 10 per cent provision to be unconstitutional, poor people will not be benefitted. On the contrary, they will clearly be harmed.

The provisions allow *all* defendants to utilize the 10 per cent provision. The trial court judge has no discretion in the matter. More options may be open to a rich defendant than a poor defendant, but wherever property is a criterion, he who has more property has more options open to him.

Without the 10 per cent provision, a rich man could make bail by depositing the full amount of the set bail. He need not visit a bondsman. A moderately poor man would end up forfeiting 10 per cent of his bond—in practice, usually more—as a fee to a professional bondsman

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16. In a sequel to this opinion Justice Douglas in *Bandy* v. *U. S.*, 82 S. Ct. 11, 7 L. Ed. 9, 11 (1961) decided that no man should be denied release because of indigence. Instead, other factors making it reasonable to believe that a man will comply with court orders, he should be released on his own recognizance. It does not appear that the plaintiff in this case, Schilb, requested a release on his own recognizance as provided by Ill. S.H.A. Ch. 38, Paragraphs 110-2, 110-6.

or remaining in jail. The really indigent defendant would not even be given the choice of forfeiting collateral or remaining in jail. Since he could not pay the bondsman 10 per cent of the amount of the bail, he was forced to remain in jail pending his trial. If later found innocent, he has truly suffered.

The 10 per cent provision does not help the completely indigent defendant. He is still forced to stay in jail due to his indigence. However, the moderately indigent defendant receives an additional alternative. He may now obtain release with forfeiture of only one per cent of the amount of bail. The rich defendant also receives an additional benefit.

Statistics show that in practice *regardless of an individual's financial status* he will post the full amount of bail when the amount of the bond is $25.00 or less and will utilize the 10 per cent deposit provision when the amount of the bond is over $25.00.

The following is a summation of statistics for the six month period of July-December 1969 inclusive. The figures represent all of the "C" (100 per cent) and "D" (10 per cent deposit) bonds written in Cook County for that period. See Appendix B to this brief for the exact figures.

Amount of Bail Equal to or Under $25.00

Total no. of "C" bonds	89,340
Total no. of "D" bonds	0

Therefore, 100 per cent of the people who are charged with a bailable offense and who are required to post a bond of $25.00 or less will deposit the full amount.

Amount of Bail over $25.00

Total no. of "C" bonds	6,923
Total no. of "D" bonds	63.300

Therefore, 90.2 per cent of the people who are charged with a bailable offense and who are required to post a bond in excess of $25.00 will utilize the 10 per cent deposit system.[16]

The following example might best illustrate why 90.2 per cent choose a "D" Bond when the amount of their bail is over $25.00:

Suppose "A" a financially well-to-do gentleman was required to post a bail bond in the amount of $1,000.00. He would thus have a choice of posting the full cash amount under Par. 110-8 or deposit 10 per cent under Par. 110-7, in which case a 1 per cent fee would be deducted.

Example 1. If "A" chose to deposit 10 per cent, he need only post $100.00. The remaining $900.00 could then realistically be invested to draw 5 per cent interest. After "A" was discharged from his obligations under the bond he would be required to pay a 1 per cent fee or $10.00. Thus "A" would have benefited by deposting the 10 per cent under Par. 110-7;

i.e.

$900.00	
.05	(5% interest per 1 year)
45.00	
-10.00	(1% fee)
$ 35.00	net gain

16. In this 9.8% are those people who are *required* to post a *mandatory* cash bond under Supreme Court Rule 526. After much discussion on this point with various individuals in the office of the Clerk of the Circuit Court, it is our opinion that the number of individuals that are *required* to post a *mandatory* cash bond amounts to one-half of the 9.8% posting "C" Bonds. See Rule 526 of the Rules of the Supreme Court of Illinois (Ill. S.H.A. Rules, Ch. 110A, Par. 526).

"A" would thus stand to make a gain unless the matter was disposed of *within* a three month period:

i.e.	$900.00	
	.0125	(5% interest for 3 months)
	11.25	
	-10.00	(1% fee)
	$ 1.25	net gain

Only a very small fraction of those cases requiring bonds in excess of $25.00 are disposed of (and without a subsequent appeal) within a three-month period.

Example 2. Note that if a "C" bond were posted, although a 1 per cent fee was not charged, the $900.00 would not be available for investment since the full amount of $1,000.00 would have had to been posted.

These examples adequately show why 90.2 per cent choose a "D" bond when the amount of the bail is in excess of $25.00.

Therefore, plaintiff-appellant's argument that those individuals who are moderately poor (those who lack sufficient property to obtain release under Par. 110-8) have no "choice" is without merit. For any individual, even if he did have sufficient property to obtain release under Par. 110-8, would not choose to post a full cash bond as shown by an overwhelming 90.2 per cent of the individuals choosing to post a "D" bond.

The practical effect of Section 110-7 is not to create "classes" on the basis of wealth.

Finally, it is interesting that the pleadings tell nothing of the financial situation of the named plaintiff, Schilb.

He seeks to represent indigents, yet he does not allege that he is, in fact, indigent. There is no evidence to show that he was unable to deposit the full amount of bail. Perhaps he is similar to the many affluent individuals in Cook County who—after weighing the economics of the situation—freely decide to utilize the 10 per cent provision.

A declaration that the Illinois 10 per cent provision is unconstitutional will not help indigent defendants. It would be a step backwards. More moderately indigent defendants would remain incarcerated prior to trial without the present reform provisions. A further increase in the jail population would benefit neither the State nor the jail population. It would result in greater expense to the State and increased suffering for those defendants who would be forced to remain in jail pending their trial.

While the Illinois legislature might one day pass further bail reform legislation to benefit the completely indigent defendant, it has not yet taken that step. State legislatures traditionally have been allowed to take reform "one step at a time," addressing whatever phase of the problem seems most acute to the legislature, *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); and a legislature need not run the risk of losing an entire remedial scheme simply because it failed to cover every evil that might conceivably be attacked. *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969).

The 10 per cent provisions were directed at the evils of the bailbondsmen. They were not intended to benefit the completely indigent. Perhaps a later statute will attack that phase of bail reform. However, the state has a compelling interest in securing a defendant's appearance and

submission to the judgments of its courts. *Reynolds* v. *U.S.*, 80 S. Ct. 30, 32, 4 L. Ed. 2d 46 (1959). Except for the universal release on recognizance, bail has always been utilized. Since it assumes that an individual owns property, there is a built-in inequality. That inequality will not be obviated until the net worth of all men is equal. Only then will bail affect all men equally. Meanwhile, the 10 per cent provision is a realistic and reasonable arrangement to minimize now otherwise inevitable inequity.

III.

ALL INDIVIDUALS WHO UTILIZE THE TEN PER CENT DEPOSIT PROVISIONS TO OBTAIN PRETRIAL RELEASE MAY BE CHARGED A FEE.

If an accused person is found innocent after utilizing the ten per cent deposit provision he is still assessed ten per cent of the deposit (or one per cent of the amount of the bail) as costs of administration. Plaintiff argues that such a practice violates substantive due process.

In support of his contention plaintiff cites *Giacco* v. *Pennsylvania*, 382 U.S. 399 (1966). He does not rely on the majority opinion but on the concurring opinions of Mr. Justice Stewart and Mr. Justice Fortas. The majority opinion found a Pennsylvania statute requiring an innocent person to pay for the costs of prosecution void for vagueness. The concurring opinions would have reached the merits while declaring the statute unconstitutional.

Under Illinois law an assessment of court costs against a discharged defendant is not permitted. *Wells* v. *McCullock*, 13 Ill. 606 (1852). The Supreme Court of Illinois found that costs imposed under Section 110-7 were not court costs, but administrative charges. 46 Ill. 2d 551, 552.

Therefore, *Giacco* is totally inapplicable to the present situation. The situation presented in *Giacco* would never arise in Illinois.

The basic difference between the situation in *Giacco* and the situation here presented, is that in *Giacco* the state was attempting to assess costs of *prosecution* upon an innocent defendant. Here, the state is imposing an administrative cost incidental to the prosecution. The state is not being reimbursed for time and expenses of the judge and prosecutor. It is being reimbursed for its administrative costs in granting an accused his statutory privilege to pretrial release at substantially less than the constitutional minimum.

Plaintiff asserts that any cost attendant to a criminal proceeding may not be imposed on an innocent accused. This Court has never decided that question. The argument is based on the following reasoning: an accused has no "say so" in whether or not he is charged. If he is eventually found innocent, why should he bear any expense?

Plaintiff's argument can logically be extended to attorney's fees and loss of wages while incarcerated and in court presenting evidence. Plaintiff's argument might also be extended to the payment of fees to professional bail-bondsmen as was the case prior to the present reform, Must the state reimburse an accused person who is found innocent for these costs attendant to a criminal prosecution? We submit that there are certain costs which must be borne by people found innocent after trial. Such costs are the price of our system of criminal justice which is necessarily imperfect because it is operated by human beings. The law provides a remedy for false arrest and violations of civil rights. However, in cases where the

state has acted with proper cause in charging a person with a crime, the administrative costs incidental to obtaining release at less than the constitutional minimum are not prohibited by the Due Process Clause.

Plaintiff emphasizes that under the Federal Bail Reform Act (18 U.S.C. 3142-3152) release may be secured upon deposit of ten per cent of the set bail and, when the conditions of the bond have been met, the entire amount will be refunded. 18 U.S.C. 3146(a)(3). Further, plaintiff states that the Federal system only departs from the Illinois system in that one area. The second statement is wrong. There are important substantive differences between the Illinois and Federal statutes. Also, each was designed to meet different problems.

The Federal Bail Reform Act was not designed to eliminate professional bailbondsmen. It was designed to assure that all persons, if at all possible, be released from jail pending their appearance in court. The Federal system is both more and less restrictive in its treatment of the accused than the Illinois system.

In Illinois, when a judge sets an amount of bail, his role with the relation to the release of the defendant ends in most cases. If an accused wishes to obtain release upon deposit of ten per cent, the judge may not forbid him from doing so. However, in the Federal system, the district court judge may, in his discretion, require the full amount of the bond be deposited in cash or securities. 18 USC 3146(a)(4). Moreover, the district court judge may also impose any other condition deemed reasonably necessary to assure appearance, including a condition requiring an accused to spend every evening prior to trial in jail. 18 USC 3146(a)(5). The Illinois judge has no such discretion.

The point of the above discussion is this: there may be more than one constitutional method of reforming a bail system. While one legislative authority might deem it best that a judge be given broad discretion in setting conditions of bond, another might not want to place such far-reaching power in a judge's hands. It may wish to restrict him to setting a reasonable amount of bail. Both can be constitutional.

This Court has stated, in *Ownbey* v. *Morgan*, 256 U.S. 94 110, 111 (1921), a case where Delaware required a non-resident to give security in the value of property attached as a condition of appearing in and defending a suit, that the "due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall."

In the area of bail reform, states should be given broad scope to experiment with solutions to the admittedly complex problems. Their approaches should not be struck down as unconstitutional merely because this Court feels they are unwise or that a different system has more benefits. Illinois has taken an enlightened position regarding bail reform. The fact that the Federal government has adopted a different enlightened position does not mean that the Illinois plan is unconstitutional.

CONCLUSION

It would indeed be ironic that a bail reform system which reduces the financial burdens of defendants who are not able to post the full amount of their set bail is held unconstitutional because it discriminates against them. For the above reasons the decision of the Supreme Court of Illinois, upholding the challenged aspects of the Illinois bail reform system, should be affirmed.

Respectfully submitted,

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Date: August 21, 1971.

APPENDIX A

Amendment XIV

Constitution of the United States

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ILLINOIS CODE OF CRIMINAL PROCEDURE
ARTICLE 110. BAIL

110—1. § 110.1 **Definitions.)** (a) "Security" is that which is required to be pledged to insure the payment of bail.

(b) "Surety" is one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all conditions of the bail bond.

110—2. § 110-2. **Release on Own Recognizance.)** When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. A failure to appear as required by such recognizance shall constitute an offense subject to the penalty provided in Section 32—10 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, for violation of the bail bond, and any obligated sum fixed in the recognizance shall be forfeited and collected in accordance with sub-section (g) of Section 110—7 of this Code.

This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused.

110—3. § 110-3. **Issuance of Warrant.)** Upon failure to comply with any condition of a bail bond or recognizance the court having jurisdiction at the time of such failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person at liberty on bail or his own recognizance.

110—4. § 110-4. **Bailable Offenses.)** (a) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense.

(b) A person charged with an offense for which death is a possible punishment has the burden of proof that he should be admitted to bail.

110—5. § 110-5. **Determining the Amount of Bail.)** (a) The amount of bail shall be:

(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

(2) Not oppressive;

(3) Commensurate with the nature of the offense charged;

(4) Considerate of the past criminal acts and conduct of the defendant;

(5) Considerate of the financial ability of the accused.

(6) When a person is charged with an offense punishable by fine only the amount of the bail shall not exceed double the amount of the maximum penalty.

(c) When a person has been convicted of an offense and only a fine has been imposed the amount of the bail shall not exceed double the amount of the fine.

110—6. § 110-6. **Reduction or Increase of Bail.)**

(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond.

(b) Reasonable notice of such application by the defendant shall be given to the State.

(c) Reasonable notice of such application by the State shall be given to the defendant, except as provided in subsection (d).

(d) Upon verified application by the State stating facts or circumstances constituting a breach or a threatened breach of any of the conditions of the bail bond the court may issue a warrant commanding any peace officer to bring the defendant without unnecessary delay before the court for a hearing on the matters set forth in the application. At the conclusion of the hearing the court may enter an order authorized by subsection (a).

110—7. § 110-7. Deposit of Bail Security.)

(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

(b) Upon depositing this sum the person shall be released from custody subject to the conditions of the bail bond.

(c) Once bail has been given and a charge is pending or is thereafter filed in or transferred to a court of competent jurisdiction the latter court shall continue the original bail in that court subject to the provisions of Section 110-6 of this Code.

(d) After conviction the court may order that the original bail stand as bail pending appeal or deny, increase or reduce bail.

(e) After the entry of an order by the trial court allowing or denying bail pending appeal either party may apply to the reviewing court having jurisdiction or to a justice thereof sitting in vacation for an order increasing

or decreasing the amount of bail or allowing or denying bail pending appeal.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith to the accused at his last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days from the date of the forfeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State if the charge for which the bond was given was a felony or misdemeanor, or if the charge was quasi-criminal or traffic, judgment for the political subdivision of the State which prosecuted the case, against the accused for the amount of the bail and costs of the court proceedings. The deposit made in accordance with subsection (a) shall be applied to the payment of costs. If any amount of such deposit remains after the payment of costs it shall be applied to payment of the judgment and transferred to

the treasury of the municipal corporation wherein the bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or to the treasury of the county wherein the bond was taken if the offense was a violation of any penal statute of this State. The balance of the judgment may be enforced and collected in the same manner as a judgment entered in a civil action.

(h) After a judgment for a fine and court costs or either is entered in the prosecution of a cause in which a deposit had been made in accordance with subsection (a) the balance of such deposit, after deduction of bail bond costs, shall be applied to the payment of the judgment.

110—8. § 110-8. Cash, Stocks, Bond and Real Estate as Security for Bail.) (a) In lieu of the bail deposit provided for in Section 110—7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

(2) By real estate situated in this State with unencumbered equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

b) If the bail bond is secured by cash or stocks and bonds the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A list of the stocks and bonds deposited describing each in sufficient detail that it may be identified;

(2) The market value of each stock and bond;

(3) The total market value of the stocks and bonds listed;

(4) A statement that the affiant is the sole owner of the stocks and bonds listed and they are not exempt from execution;

(5) A statement that such stocks and bonds have not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that such stocks and bonds are security for the appearance of the accused in accordance with the conditions of the bail bond.

(c) If the bail bond is secured by real estate the accused or sureties shall file with the bond a sworn schedule which shall contain:

(1) A legal description of the real estate;

(2) A description of any and all encumbrances on the real estate including the amount of each and the holder thereof;

(3) The market value of the unencumbered equity owned by the affiant;

(4) A statement that the affiant is the sole owner of such unencumbered equity and that it is not exempt from execution;

(5) A statement that the real estate has not previously been used or accepted as bail in this State during the 12 months preceding the date of the bail bond; and

(6) A statement that the real estate is security for the appearance of the accused in accordance with the conditions of the bail bond.

(d) The sworn schedule shall constitute a material part of the bail bond. The affiant commits perjury if in the sworn schedule he makes a false statement which he does not believe to be true. He shall be prosecuted and punished accordingly, or, he may be punished for contempt.

(e) A certified copy of the bail bond and schedule of real estate shall be filed immediately by the court in the office of the registrar of titles or recorder of deeds of the county in which the real estate is situated and the State shall have a lien on such real estate from the time such copies are filed in the office of the registrar of titles or recorder of deeds. The registrar of titles or recorder of deeds shall enter, index and record (or register as the case may be) such bail bonds and schedules without requiring any advance fee, which fee shall be taxed as costs in the proceeding and paid out of such costs when collected.

(f) When the conditions of the bail bond have been performed and the accused has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged.

(g) If the accused does not comply with the conditions of the bail bond the court having jurisdiction shall enter an order declaring the bail to be forfeited. Notice of such order of forfeiture shall be mailed forthwith by the clerk of the court to the accused and his sureties at their last known address. If the accused does not appear and surrender to the court having jurisdiction within 30 days

from the date of the forefeiture or within such period satisfy the court that appearance and surrender by the accused is impossible and without his fault the court shall enter judgment for the State against the accused and his sureties for the amount of the bail and costs of the proceedings.

(h) When judgment is entered in favor of the State on any bail bond the State's Attorney shall have execution issued on the judgment forthwith and deliver same to the sheriff to be executed by levy on the cash, stocks or bonds deposited with the clerk of the court and the real estate described in the bail bond schedule. The cash shall be used to satisfy the judgment and costs and paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The stocks, bonds and real estate shall be sold in the same manner as in execution sales in civil actions and the proceeds of such sale shall be used to satisy all court costs, prior encumbrances, if any, and from the balance a sufficient amount to satisfy the judgment shall be paid into the treasury of the municipal corporation wherein the bail bond was taken if the offense was a violation of any penal ordinance of a political subdivision of this State, or into the treasury of the county wherein the bail bond was taken if the offense was a violation of any penal statute of this State. The balance shall be returned to the owner. The real estate so sold may be redeemed in the same manner as real estate may be redeemed after judicial or execution sales in civil actions.

(i) No stocks, bonds or real estate may be used or accepted as bail bond security in this State more than once in any 12 month period. As amended by act approved July 31, 1967. L 1967, p. ——, H.B. No. 862.

110—9. § 110-9. Taking of Bail by Peace Officer.) When bail has been set by a judicial officer for a particular offense or offender any sheriff or other peace officer may take bail in accordance with the provisions of Section 110—7 or 110—8 of this Code and release the offender to appearance in accordance with the conditions of the bail bond, the Notice to Appear or the Summons. The officer shall give a receipt to the offender for the bail so taken and within a reasonable time deposit such bail so taken and within a reasonable time deposit such bail with the clerk of the court having jurisdiction of the offense.

110—10. § 110-10. Conditions of Bail Bond.) (a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will:

(1) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court;

(2) Submit himself to the orders and process of the court; and

(3) Not depart this State without leave.

(b) If the defendant is admitted to bail after conviction the conditions of the bail bond shall be that he will:

(1) Duly prosecute his appeal;

(2) Appear at such time and place as the court may direct;

(3) Not depart this State without leave of the court and

(4) If the judgment is affirmed or the cause reversed and remanded for a new trial, forthwith surrender to the officer from whose custody he was bailed.

110—11. § 110-11. **Bail on a New Trial.)** If the judgment of conviction is reversed and the cause remanded for a new trial the trial court may order that the bail stand pending such trial, or reduce or increase the bail.

110—12. § 110-12. **Notice of Change of Address.)** A person who has been admitted to bail shall give written notice to the clerk of the court before which the proceeding is pending of any change in his address within 24 hours after such change.

110—13. § 110-13. **Persons Prohibited from Furnishing Bail Security.)** No attorney at law practicing in this State and no official authorized to admit another to bail or to accept bail shall furnish any part of any security for bail in any criminal action or any proceeding nor shall any such person act as surety for any accused admitted to bail.

110—14. § 110-14. **Credit for Incarceration on Bailable Offense.)** Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated prior to conviction except that in no case shall the amount so allowed or credited exceed the amount of the fine.

110—15. § 110-15. **Applicability of Provisions for Giving and Taking Bail.)** The provisions of Sections 110-7 and 110-8 of this Code are exclusive of other provisions of law for the giving, taking, or enforcement of bail. In all cases where a person is admitted to bail the provisions of Section 110-7 and 110-8 of this Code shall be applicable.

However, the Supreme Court may, by rule or order, prescribe a uniform schedule of amounts of bail in specified traffic and conservation cases, quasi-criminal offenses, and misdemeanors. Such uniform schedule may provide that the cash deposit provisions of Section 110-7 shall not apply to bail amounts established for alleged violations punishable by the fine alone, and the schedule may further provide that in specified traffic cases a valid Illinois chauffeur's or operator's license must be deposited, in addition to 10% of the amount of bail specified in the schedule. As amended by act approved Aug. 14, 1967. L. 1967, p. ——, S.B. No. 1168.

§ 3146. Release in noncapital cases prior to trial.

(a) Any person charged with an offense, other than an offense punishable by death, shall, at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such a determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security as directed, of a sum not to exceed 10 per centum of the amount of the bond, such deposit to be returned upon the performance of the conditions of release;

(4) require the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; or

(5) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(b) In determining which conditions of release will reasonably assure appearance, the judicial officer shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings.

(c) A judicial officer authorizing the release of a person under this section shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violations of the conditions of his release and shall advise him that a warrant for his arrest will be issued immediately upon any such violation.

(d) A person for whom conditions of release are imposed and who after twenty-four hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition which requires that he return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is thereupon released on another condition, the judicial officer shall set forth in writing the reasons for continuing the requirement. In

the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review such conditions.

(e) A judcial officer ordering the release of a person on any condition specified in this section may at any time amend his order to impose additional or different conditions of release: *Provided,* That, if the imposition of such additional or different conditions results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of subsection (d) shall apply.

(f) Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law.

(g) Nothing contained in this section shall be construed to prevent the disposition of any case or class of cases by forfeiture of collateral security where such disposition is authorized by the court. Added Pub. L. 89—465, § 3(a), June 22, 1966, 80 Stat. 214.

APPENDIX B

BONDS WRITTEN IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

July, 1969 to December, 1969 (Inclusive).

District 1.

	NUMBER	AMOUNT
D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	40,640	38,819,695.00
C-Bonds $25.00 or under	62,554	1,563,014.00
C-Bonds over $25.00	1,114	171,738.00

District 2.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	3,630	3,776,650.00
C-Bonds $25.00 or under	5,151	128,703.00
C-Bonds over $25.00	501	103,295.00

District 3.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	5,054	5,531,950.00
C-Bonds $25.00 or under	6,493	162,292.00
C-Bonds over $25.00	2,122	579,688.00

District 4.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	2,910	3,456,925.00
C-Bonds $25.00 or under	4,648	116,139.00
C-Bonds over $25.00	1,186	279,703.00

District 5.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	4,835	4,902,000.00
C-Bonds $25.00 or under	6,170	154,240.00
C-Bonds over $25.00	1,078	354,547.00

District 6.

D-Bonds $25.00 or under	0	$ 0.00
D-Bonds over $25.00	6,231	6,116,940.00
C-Bonds $25.00 or under	4,324	108,077.00
C-Bonds over $25.00	922	203,112.00

SUPREME COURT, U. S.

Supreme Ct.

OCT 2 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-90
(Formerly No. 1412)

JOHN SCHILB, et al.,

Plaintiffs-Appellants,

vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

REPLY BRIEF

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Appeal from the Supreme Court of the State of Illinois

REPLY BRIEF

Article 110 of the Illinois Criminal Code (Ill. Rev. Stat. 1963, etc., Ch. 38, Par. 110-1 *et seq.*) provides for the pretrial release of an accused:

1. On his individual recognizance (Sec. 110-2);
2. On the deposit of 10% of the full amount of bail (Sec. 110-7);

3. On the deposit of cash, stocks or bonds in the full amount of bail, or pledging real estate in double the amount of bail (Sec. 110-8).

Article 110 imposes a bail cost (Sec. 110-7 (f)) upon those released under Section 110-7, but imposes no like cost upon those released under either Sections 110-2 or 110-8.

This is a class action, commenced on behalf of John Schilb and all others similarly situated, who paid a bail cost pursuant to Section 110-7 (f). (Complaint, A. 4-12); (Answer, A. 13-15); (Stipulation, A. 17-22); and, (Opinion, A. 30-31)].

It is respectfully submitted that plaintiffs have established in their principal brief that the cost retention provision of Section 110-7 (f) contravenes and violates the Due Process and Equal Protection of the Laws Clauses of the Fourteenth Amendment to the Constitution of the United States, for:

1. The imposition of the bail cost on only one segment of the class gaining pretrial release creates an "invidious discrimination" by imposing a burden on this segment while imposing no similar burden on others gaining pretrial release. *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966);
2. The imposition of the entire burden of supporting the Illinois Bail System on those persons gaining pretrial release who are least able to afford it—the poor and non-affluent (*Bandy* v. *U.S.*, 81 S. Ct. 197 (1966)—penalizes that segment in a quest for justice due to their lack of wealth, *Griffin* v. *Illinois*, 351 U.S. 12 (1956); and,
3. The imposition of bail costs upon the innocent violates the most rudimentary concept of Due Process (*Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

These are the three issues presented.

The defendants have failed to meet these issues; rather they have attempted to create the impression that plaintiffs seek to attack and destroy the entire bail system in Illinois and resurrect the evils of the bondsmen. Nothing could be further from the fact. The plaintiffs from the inception of this action have consistently supported this "progressive legislation". *They do not challenge the 10% deposit—they challenge the retention of 10% of that deposit.*

Defendants have attempted to justify the imposition of bail costs on John Schilb, and all others similarly situate, by circumventing the issues. *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966), may not be distinguished by a dissertation on the evils of the professional bail bondsman. *Griffin* v. *Illinois,* 351 U.S. 12 (1956), cannot be ignored by a discussion of the differences between the "moderately poor" and the indigent, and similarly, the force and logic of *Giaccio* v. *Pennsylvania,* 382 U.S. 399 (1966), is not dissipated by the bald assertion that the 10% retention amount is an "administrative charge" and not a court cost attendant to a criminal prosecution.

CONCLUSION

WHEREFORE the plaintiffs respectfully pray that the decision of the Supreme Court of the State of Illinois be reversed.

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IN THE

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vs.

VINCENT P. KUEBEL, as Clerk of the Circuit Court of St. Clair County, et al.,

Defendants-Appellees.

Appeal from the Supreme Court of the State of Illinois

PETITION FOR REHEARING

Plaintiffs respectfully petition this honorable Court to grant a rehearing of this cause, in which the opinion rendered on December 20, 1971, affirmed the opinion of the Supreme Court of the State of Illinois. As grounds for such petition, plaintiffs respectfully submit that the Court in its opinion has overlooked or misapprehended certain factual, procedural, and substantive principles.

I.

A DECISION IN FAVOR OF THE PLAINTIFFS WILL NOT RESULT IN THE RETURN OF THE BONDSMAN SYSTEM.

The sole contention of plaintiffs in this case is that the provision of the Illinois Bail Act which provides for the retention by the clerk of an amount equal to 1% (Section 110-7(f)) of the total amount of the bond is an arbitrary and unreasonable discrimination against some of the people who secure their liberty pending trial under the provisions of the Act. In an apparent effort to overcome discrimination by the statute, defendants contended in this Court for the first time that if plaintiffs' position were sustained the entire Illinois Bail Act would fall and the evils of professional bondsmen would return. That is neither the fact nor the law.

In the State of Illinois only the provision which is held to be unconstitutional will fall, and the rest and remainder of the statute remains in full force and effect. *Livingston* v. *Ogilvie,* 43 Ill. 2d 9; *Hornof* v. *Kroger Co.,* 35 Ill. 2d 125; *People ex rel. Holland Coal Co.* v. *Isaacs,* 22 Ill. 2d 477.

The cost provision of Section 110-7(f) is separable, and the salutary provisions of the Illinois Bail Act [Ill. Rev. Stat. 1963, Ch. 38, Pars. 110-1 et seq.] will remain in full force and effect.

II.

FUNDAMENTAL RIGHTS OF THE PLAINTIFFS ARE INVOLVED FOR THE SALIENT ISSUE IS THE LIBERTY OF AN INDIGENT WHO DOES NOT HAVE FUNDS EQUAL TO AT LEAST ONE PERCENT OF THE AMOUNT OF BAIL FIXED.

The majority opinion rightfully recognized that "Our concern . . . is with the 1% cost retention provision".

Regretably however the majority thought:

> "This smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criteria." (Op. 8)

The real fact of the matter, however, is that the cost retention provision directly affects the ability of the poorest of our citizens to utilize the benefits of the Illinois Bail Bond Act. Thus this provision is "fundamental" to the liberty of probably the most deserving group of persons under the Act. This is true because if one is accused of a crime and bond is set at $10,000, not having any assets he is required to remain incarcerated prior to trial if he cannot borrow the $1,000 necessary for the ten percent deposit under Section 110-7. But who is going to lend it to him, if all he can guarantee is a return of $900? Accordingly, the issue is his liberty—not "administrative detail and procedure" (Op. 8). In addition to his loss of liberty, his imprisonment pending trial materially affects his preparation of his defense; his ability to earn money to hire counsel and support his family; the ultimate outcome of the trial; and imposes costs on the public [Attorney General's Committee on Poverty and

the Administration of Criminal Justice Procedure Report (U. S. Cong. and Admin. Ntws 1966 p. 2299)]. The real "compelling public interest" therefore is liberty pending trial.

There is nothing of record to show that the distinction created by the imposition of the cost on those gaining release under Section 110-7, as opposed to those gaining release on their own recognizance under Section 110-2 or full deposit of bail under Section 110-8, rests upon a rational basis. At no time prior to the passage of Section 110-7(f) were any administrative costs of the office of the Clerk imposed upon anyone gaining pretrial release. By the enactment of Section 110-7(f) a new concept of cost recoupment was instituted in the State of Illinois; and the disparity condemned in *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966) was created—a disparity which had "no relevance to the purpose for which the classification was made" [384 U.S. 309; see also *Reed* v. *Reed*, 92 S. Ct. 251 (1971)].

Recoupment of administrative costs of making bail of *some* provided by Section 110-7(f) cannot be equated to the fees formerly charged by a bondsman. The bondsman assumed a risk of liability if the terms of bail were violated. The Clerk has never assumed liability, but was then and is now merely a stakeholder. The administrative cost borne by that group of poor who comply with the terms of their bond, whether they are adjudged innocent or guilty, is simply not justified under any concept of equal protection. *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Mayer* v. *City of Chicago*, 40 L. Week 4055 (Dec. 13, 1971).

While it is true that the majority of the Court cite the *Rinaldi* and *Griffin* doctrines with approval, and thus

appear to prescribe to those concepts of equal protection, the refusal to apply those principles in the instant case is tantamount to overruling those decisions *sub silentio,* adding confusion to an area of constitutional law of tremendous importanee to all the people, but to the poor in particular, not only in Illinois but also in all of the States of the United States.

It is no answer to the charge of discrimination to say plaintiffs are better off being charged 1% rather than 10%. At no time in the history of the administration of Illinois bail was that 1% ever imposed for administration bail cost. It was a new concept, a new cost which was created by Section 110-7. Can this administrative cost justifiably be imposed on only those released under 110-7 when work is done for all. Remember the 10% bondsman fee were charged only on those who utilized his service. If the decision of this Court is unchanged, what today is 1%, tomorrow may be 5%, and the day after may be 10%.

In addition, the failure to recognize the importance of the refusal of Congress to impose the one percent burden of those released on 10% of deposit is apparently based upon the misconception that there were no federal bail bondsmen. This is not the fact. The Federal Bail Reform Act, like its Illinois counterpart, was intended to reduce the cost of making bonds to persons awaiting trial.

III.

FACTUAL MISCONCEPTIONS.

Distinguishing those released under Section 110-8 and those released under Section 110-7 of the Illinois Criminal Code, the Court stated "one who deposits securities

or encumbers his real estate precludes the use of that property for other purposes'' (Op. 13). In practice the affluent (those with a true choice and means—Committee Comments, Chap. 38, par. 110-1) and those with business acumen would utilize Section 110-8 rather than deposit 10% of full bail in cash under Section 110-7. Securities, bonds, stocks and real estate are deposited in *specie* or subject to a lien. Said depositors are not deprived of the income earned by said securities, etc., nor the use of the real estate. These depositors, not the State, are the recipients of any interest, dividends or rents produced.

To illustrate we submit the following hypothetical situation. If "A'' is accused of a crime and bond is set at $10,000, having sufficient assets he deposits a United States Treasury Bill in the face value of $10,000 under Section 110-8. One year after deposit he is found guilty as charged. The $10,000 Treasury Bill is returned to him; no bail costs are imposed upon him by the Clerk and he has earned $600 interest.

Conversely, "B" is charged with the same crime and bond is likewise set at $10,000. Not having sufficient assets he is forced to borrow $1,000 from a small loan company, and obtains release under Section 110-7. One year after said deposit he is found not guilty and released. The Clerk of the Court charges him $100 as bail cost under Section 110-7(f). "B" is further obligated to repay the $1,000 he borrowed plus interest of $180 for exercising his constitutional right to remain free prior to trial.

The affluent have a choice ,a choice which can definitely be traced to and predicated upon economic factors, and we submit that the statistics provided by the defendant (Aple. Br. App. B) prove that there are those with sufficient property who utilize Section 110-8 for their

economic advantage and to the detriment of those without such assets. It is those without such assets upon whom the full burden of supporting the administration of the bail system falls.

The Court has suggested that for the non-affluent and the indigent the system can best be served upon their release upon their own recognizance under Section 110-2. In this we agree fully. However, it is an unrealistic solution for it is the poor, transient, felons, homeless, deprived and unstable who are clearly not the recipients of release upon their personal recognizance as evidenced by the criteria set forth in Section 110-5.

These are such apparent facts that an editorial appeared in the Chicago Daily News (Appendix A) relative to this cause, which stated:

> "Though the tribunal's majority held that no evidence was presented to show that recognizance bonds were granted more often for the well-to-do than the poor, the fact is that such discrimination does exist."

Further, we submit that as the release on recognizance is expanded within the State of Illinois, or any other jurisdiction, it will be extended to those who have roots in the community—not to those less fortunate, and as the editorial continues:

> "As a matter of equity, the Legislature should amend the law to prohibit the collection of the 10% administrative fee by the Courts. This discriminatory provision will become even less tolerable as the use of recognizance bonds becomes more wide spread."

We submit that this is inevitable. As release upon recognizance is expanded, the cost burden will fall more heavily upon the non-affluent and the less fortunate segment of our society. Since the majority has approved a

statutory discrimination, without regard to degree, there might be an effort to increase the rate to meet administrative costs not contributed to by other persons, not only in Illinois but in all jurisdictions.

This reimbursement of the costs has nothing to do with forfeitures. Upon default the deposits are immediately collected and mandatory judgments are entered for the full amount.

It is significant that other States (Iowa and Alaska) have similar systems which are functioning without such imposition of costs as is that of the Federal Government. The savings to the taxpayer for the costs of the incarceration has more than reimbursed the governmental units for any increase in costs of administration. It thus appears that the "compelling public interest" is in the elimination of this discriminatory impediment to liberty of all persons pending trial.

CONCLUSION

The plaintiffs-appellants respectfully pray that this Honorable Court grant this petition for rehearing.

Respectfully submitted,

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APPENDIX A

CHICAGO DAILY NEWS

An Independent Newspaper Founded January 1, 1876

Marshall Field, Publisher

* * *

Tuesday, December 28, 1971

More bail reform needed

Though we welcome the U.S. Supreme Court's approval of Illinois' bail bond reform law, we believe the case that tested it brought out a flaw that should be corrected.

The reform act, adopted in 1963, is essentially sound and fair. As Justice Harry Blackmun said for the four-man court majority. it brought "needed relief" from the professional bailbondsman system that was "in full and odorous bloom" before its enactment. The law permits a defendant to be freed on posting of only 10 per cent of the total bond.

The challenge against the law's constitutionality centered on the provision permitting the courts to keep 10 per cent of the defendant's payment, whether he was found innocent or guilty. The suit contended this unfairly levied a court cost against the innocent and discriminated against poor defendants since no costs are imposed on wealthier defendants who are freed on their own personal recognizance. Though the tribunal's majority held that no evidence was presented to show that recognition bonds were granted more often for the well-to-do than for the poor, the fact is that such discrimination does exist.

But the question of a defendant's solvency has no bearing on establishing that the law still discriminates between defendants—poor or rich— who are released on their own recognizance and those who are required to post cash bonds. Justice Potter Stewart, speaking for the three-man minority, rightly concluded that since administrative costs are not levied against people released on recognizance, the law violates the Constitution's equal protection clause.

The court's close division on this issue crossed customary lines, with two liberals and one other conservative siding with Blackmun, and two liberals joining the conservative Stewart. If there were a rehearing on the case when the two new justices are seated on the court, the decision conceivably could swing the other way.

As a matter of equity, the Legislature should amend the law to prohibit the collection of the 10-per cent administrative fee by the courts. This discriminatory provision will become even less tolerable as the use of recognizance bonds becomes more widespread.

Syllabus

SCHILB ET AL. *v.* KUEBEL ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

No. 70–90. Argued October 12, 1971—Decided December 20, 1971

Illinois law provides three ways in which an accused can secure his pretrial release: (1) personal recognizance; (2) execution of a bail bond, with a deposit of 10% of the bail, all but 10% of which (amounting to 1% of the bail) is returned on performance of the bond conditions, and (3) execution of a bail bond, secured by a full-amount deposit in cash, authorized securities, or certain real estate, all of which is returned on performance of the bond conditions. Appellant Schilb, charged with two traffic offenses, secured pretrial release after depositing 10% of the bail fixed. He was convicted of one offense and acquitted of the other. After he paid his fine, all but 1% of the bail (amounting to $7.50) was refunded. In this class action he thereafter challenged the Illinois system on due process and equal protection grounds, claiming that the 1% retention charge is imposed on only one segment of the class gaining pretrial release, and on the poor but not on the rich; and that its imposition on an accused found innocent constitutes a court cost against the nonguilty. The trial court dismissed Schilb's complaint, and the State Supreme Court affirmed. *Held:*

1. The Illinois bail system does not violate equal protection requirements. Pp. 364–370.

(a) The facts that the State has no safekeeping costs where release is on personal recognizance and has never imposed a charge with respect to a recognizance provide a rational basis for distinguishing that situation from the situations where deposits are made. Though the administrative costs of the deposit systems are substantially the same, other factors afford a rational basis for making no charge under the full-amount-deposit system. *Rinaldi* v. *Yeager*, 384 U. S. 305, distinguished. Pp. 367–369.

(b) There is no indication that the personal recognizance system is not used without regard to the economic status of the accused, or that the full-deposit system actually favors the affluent. Pp. 369–370.

2. No due process denial results from retention of the 1% charge, which is an administrative fee (and not a cost of prosecution), imposed on all—guilty and innocent alike—who seek its

benefit. *Giaccio* v. *Pennsylvania*, 382 U. S. 399, distinguished. Pp. 370–371.

46 Ill. 2d 538, 264 N. E. 2d 377, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and MARSHALL, JJ., joined. MARSHALL, J., filed a concurring opinion, *post*, p. 372. DOUGLAS, J., filed a dissenting opinion, *post*, p. 373. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 381.

John J. O'Toole argued the cause for appellants. With him on the briefs were *John C. Castanes* and *Cornelius F. Dore*.

James A. Rooney argued the cause for appellees *pro hac vice*. With him on the brief were *Robert H. Rice* and *Eugene H. Widman*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

John Schilb, of Belleville, Illinois, was arrested on January 16, 1969, and charged (a) with leaving the scene of an automobile accident and (b) with obstructing traffic. In order to gain his liberty pending trial, and in accord with the Illinois bail statutes hereinafter described, Schilb deposited $75 in cash with the clerk of the court. This amount was 10% of the aggregate bail fixed on the two charges ($500 on the first and $250 on the second). At his ensuing trial Schilb was acquitted of the charge of leaving the scene, but was convicted of traffic obstruction. When he paid his fine, the amount Schilb had deposited was returned to him decreased, however, by $7.50 retained as "bail bond costs" by the court clerk pursuant to the statute. The amount so retained was 1% of the specified bail and 10% of the amount actually deposited.

Schilb, by this purported state class action against the court clerk, the county, and the county treasurer, at-

tacks the statutory 1% charge on Fourteenth Amendment due process and equal protection grounds.[1] The Circuit Court of Saint Clair County upheld the statute and dismissed the complaint. The Supreme Court of Illinois affirmed, with two justices dissenting. 46 Ill. 2d 538, 264 N. E. 2d 377 (1970). We noted probable jurisdiction. 402 U. S. 928 (1971).

I

The Illinois bail statutes compose Article 110 of the State's Code of Criminal Procedure of 1963, made effective January 1, 1964. This Code complemented Illinois' then new and revised Criminal Code of 1961, made effective January 1, 1962. The work of revision of the theretofore existing statutes was that of a Joint Committee of the Illinois State and Chicago Bar Associations. See 1 Ill. Rev. Stat. 1963, p. 1629.

Prior to 1964 the professional bail bondsman system with all its abuses[2] was in full and odorous bloom in Illinois. Under that system the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute, House Bill No. 734, approved July 17, 1959, Ill. Laws 1959, pp. 1372, 1376, and retained that entire amount even though the accused fully satisfied the conditions of the bond. See *People ex rel. Gendron* v. *Ingram*, 34 Ill. 2d 623, 626, 217 N. E. 2d 803, 805 (1966). Payment of this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable

[1] Schilb also attacked the statute as violative of Art. II, §§ 2 and 19, of the Illinois Constitution of 1870 (now Art. I, §§ 2 and 12, of the State's 1970 Constitution).

[2] See D. Freed & P. Wald, Bail in the United States: 1964, pp. 34–35 (1964); R. Goldfarb, Ransom 92–126 (1965); Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35.

burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system.

One of the stated purposes of the new bail provisions in the 1963 Code was to rectify this offensive situation. The purpose appears to have been accomplished. It is said that the bail bondsman abruptly disappeared in Illinois "due primarily to the success of the ten percent bail deposit provision." Boyle, Bail Under the Judicial Article, 17 De Paul L. Rev. 267, 272 (1968). See Kamin, Bail Administration in Illinois, 53 Ill. B. J. 674, 680 (1965).

II

Article 110 of the 1963 Code, as it read at the time Schilb was arrested and charged, provided that an eligible accused could obtain pretrial release in one of three ways:

(1) Under § 110–2 he may be released on his personal recognizance.[3]

(2) Under § 110–7 he may execute a bail bond and deposit with the clerk cash equal to only 10% of the bail or $25, whichever is the greater.[4] When bail is made in

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[3] "§ 110–2. Release on Own Recognizance

"When from all the circumstances the court is of the opinion that the accused will appear as required either before or after conviction the accused may be released on his own recognizance. . . .

"This Section shall be liberally construed to effectuate the purpose of relying upon criminal sanctions instead of financial loss to assure the appearance of the accused."

[4] "§ 110–7. Deposit of Bail Security

"(a) The person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.

. . . .

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the

this way and the conditions of the bond have been performed, the clerk returns to the accused 90% of the sum deposited. The remaining 10% (1% of the bail) is retained by the clerk "as bail bond costs."

(3) Under § 110–8 he may execute a bail bond and secure it by a deposit with the clerk of the full amount of the bail in cash, or in stocks and bonds authorized for trust funds in Illinois, or by unencumbered nonexempt Illinois real estate worth double the amount of the bail.[5] When bail is made in this way and the conditions of

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cause the clerk of the court shall return to the accused 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited."

Section 110–7 (f) was amended in 1969 by Pub. Act 76–1195, approved Sept. 4, 1969, by Pub. Act 76–1394, approved Sept. 19, 1969, and by Pub. Act 76–1801, approved Oct. 9, 1969. It was further amended in 1970 by Pub. Act 76–2078, approved June 22, 1970, and now reads:

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from all obligations in the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited. However, in no event shall the amount retained by the clerk as bail bond costs be less than $5.

"At the request of the defendant the court may order such 90% of defendant's bail deposit, or whatever amount repayable to defendant from such deposit, to be paid to defendant's attorney of record."

[5] "§ 110–8. Cash, Stocks, Bonds and Real Estate as Security for Bail

"(a) In lieu of the bail deposit provided for in Section 110–7 of this Code any person for whom bail has been set may execute the bail bond with or without sureties which bond may be secured:

"(1) By a deposit, with the clerk of the court, of an amount equal to the required bail, of cash, or stocks and bonds in which trustees are authorized to invest trust funds under the laws of this State; or

"(2) By real estate situated in this State with unencumbered

the bond have been performed, the clerk returns the deposit of cash or stocks or bonds, or releases the real estate, as the case may be, without charge or retention of any amount.

In each case bail is fixed by a judicial officer. Section 110–5 prescribes factors to be considered in fixing the amount of bail.[6] Under § 110–6 either the State or the defendant may apply to the court for an increase or for a reduction in the amount of bail or for alteration of the bond's conditions.[7]

The choice between § 110–7 and § 110–8 is reserved to the accused.

The thinking and intentions of the Joint Committee revisors are apparent from the Committee's comments, as revised by its Chairman, Professor Charles H. Bowman,

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equity not exempt owned by the accused or sureties worth double the amount of bail set in the bond.

"(f) When the conditions of the bail bond have been performed and the accused has been discharged from his obligations in the cause, the clerk of the court shall return to him or his sureties the deposit of any cash, stocks or bonds. If the bail bond has been secured by real estate the clerk of the court shall forthwith notify in writing the registrar of titles or recorder of deeds and the lien of the bail bond on the real estate shall be discharged."

[6] "§ 110–5. Determining the Amount of Bail

"(a) The amount of bail shall be:

"(1) Sufficient to assure compliance with the conditions set forth in the bail bond;

"(2) Not oppressive;

"(3) Commensurate with the nature of the offense charged;

"(4) Considerate of the past criminal acts and conduct of the defendant;

"(5) Considerate of the financial ability of the accused."

[7] "§ 110–6. Reduction or Increase of Bail

"(a) Upon application by the State or the defendant the court before which the proceeding is pending may increase or reduce the amount of bail or may alter the conditions of the bail bond."

and reproduced in Ill. Ann. Stat., c. 38 (Smith-Hurd ed. 1970).[8]

The parties have stipulated that when bail in a particular case is fixed, the judge's "discretion in such respect

[8] ". . . The provisions of sections 110–7 and 110–8 were designed to severely restrict the activities of professional bail bondsmen and to reduce the cost of liberty to arrested persons awaiting trial. . . ." (P. 298.)

"The committee realized full well the many arguments advanced in opposition to changing the present system. We were not impressed with any of them. If a person can pay a professional bondsman ten per cent of the bail amount as a fee, he can deposit it with the clerk. At the present time he receives nothing back from the bondsman if he appears for trial; his ten per cent fee is gone. Under the provisions of [§ 110–7 (f)] he gets back ninety per cent of the amount deposited if he appears. The ten per cent of the deposit retained by the county will offset in monetary amount the costs of handling bail bonds (which must be done now anyway), and any loss resulting from the occasional bail jumper where the professional bondsman might now forfeit the amount of the bail. . . ." (P. 300.)

"This section [§ 110–7] is new and provides the procedure for depositing ten per cent of the amount of bail as security for appearance. However, the bail bond will provide for forfeiture of the full amount of the bail upon non-appearance. In addition, the accused would be subject to the penal provisions for bail jumping. However, subsection (f) provides for a return of ninety per cent of the bail deposit (which amounts to one per cent of the amount of bail set by the court in the first instance) to the accused upon compliance with the conditions of the bail bond. The ten per cent of the deposit retained by the clerk is to cover costs of handling bail bonds and deposits." (P. 316.)

"There is nothing in Article 110 which is intended to work any additional hardship on anyone in the giving of bail. It is designed to permit the continuation of present practices in regard to sheriffs, police officers, etc., taking cash bail or drivers' licenses, and to simplify the procedures in all other cases so as to lessen the ultimate cost of bail to offenders (by thousands of dollars each year) who appear for trial anyway, and to assure to the counties in every case a reasonable amount (one per cent of the total amount of bail set) to cover the cost of time and paper-work involved in handling bail cases." (P. 324.)

is not guided by statute, rule of court or any definite, fixed standard; various and divers judges in fact fix the amount of bail for the same types of offenses at various and divers amounts, without relationship as to guilt or innocence of the particular defendant in a criminal charge, and without relationship of the particular offense charged and the bail fixed." They have also stipulated, "The actual cost of administering the provisions of said Sections 110–7 and 110–8 are substantially the same but there may probably be a slightly greater cost in the administration of Section 110–8."

III

The Court more than once has said that state legislative reform by way of classification is not to be invalidated merely because the legislature moves one step at a time. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). "Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them. . . . With this much discretion, a legislature traditionally has been allowed to take reform 'one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.'" *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802, 809 (1969). The measure of equal protection has been described variously as whether "the distinctions drawn have some basis in practical experience," *South Carolina* v. *Katzenbach*, 383 U. S. 301, 331 (1966), or whether the legislature's action falls short of "the invidious discrimination," *Williamson* v. *Lee Optical Co.*, 348 U. S., at 489, or whether "any state of facts reasonably may be conceived to justify" the statutory discrimination, *McGowan* v. *Maryland*, 366 U. S. 420, 426 (1961); see

United States v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4, 6 (1970), or whether the classification is "on the basis of criteria wholly unrelated to the objective of [the] statute," *Reed* v. *Reed*, *ante*, p. 71, at 76. But the Court also has refined this traditional test and has said that a statutory classification based upon suspect criteria or affecting "fundamental rights" will encounter equal protection difficulties unless justified by a "*compelling* governmental interest." *Shapiro* v. *Thompson*, 394 U. S. 618, 634, 638 (1969); *Oregon* v. *Mitchell*, 400 U. S. 112, 247 n. 30 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

Bail, of course, is basic to our system of law, *Stack* v. *Boyle*, 342 U. S. 1 (1951); *Herzog* v. *United States*, 75 S. Ct. 349, 351 (1955) (opinion of DOUGLAS, J.), and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. *Pilkinton* v. *Circuit Court*, 324 F. 2d 45, 46 (CA8 1963); see *Robinson* v. *California*, 370 U. S. 660, 666 (1962), and *id.*, at 675 (DOUGLAS, J., concurring). But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a "fundamental" right or as based upon any suspect criterion. The applicable measure, therefore, must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis? *Dandridge* v. *Williams*, 397 U. S. 471, 483–487 (1970). See *Richardson* v. *Belcher*, *ante*, p. 78, at 81.

IV

With this background, we turn to the appellants' primary argument. It is threefold: (1) that the 1% reten-

tion charge under § 110–7 (f) is imposed on only one segment of the class gaining pretrial release; (2) that it is imposed on the poor and nonaffluent and not on the rich and affluent;[9] and (3) that its imposition with respect to an accused found innocent amounts to a court cost assessed against the not-guilty person.

We are compelled to note preliminarily that the attack on the Illinois bail statutes, in a very distinct sense, is paradoxical. The benefits of the new system, as compared with the old, are conceded.[10] And the appellants recognize that under the pre-1964 system Schilb's particular bail bond cost would have been 10% of his bail, or $75; that this premium price for his pretrial freedom, once paid, was irretrievable; and that, if he could not have raised the $75, he would have been consigned to jail until his trial. Thus, under the old system the cost of Schilb's pretrial freedom was $75, but under the new it was only $7.50. While acknowledging this obvious benefit of the statutory reform, Schilb and his co-appellants decry the classification the statutes make and present the usual argument that the legislation must be struck down because it does not reform enough.

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[9] Schilb has neither alleged nor shown that he is indigent or that he applied for and was denied release on his personal recognizance. No question of standing, however, was raised in the Illinois courts or here. The Illinois Supreme Court found it unnecessary to pass upon the propriety of the class action. 46 Ill. 2d, at 552, 264 N. E. 2d, at 384.

[10] "QUESTION: Mr. O'Toole [counsel for appellants], [if] you prevail here, do you anticipate the old bondman system will be revised?

"MR. O'TOOLE: Oh no, your Honor . . . that is the furthest thing—we want to make that eminently clear. We believe this to be very good legislation. We feel this aspect of it is wrong. Definitely not, there would not be any reincarnation of the bondsman." Tr. of Oral Arg. 11.

A. It is true that no charge is made to the accused who is released on his personal recognizance. We are advised, however, that this was also true under the old (pre-1964) system and that "Illinois has never charged people out on recognizance." [11] Thus, the burden on the State with respect to a personal recognizance is no more under the new system than what the State had assumed under the old. Also, with a recognizance, there is nothing the State holds for safekeeping, with resulting responsibility and additional paperwork. All this provides a rational basis for distinguishing between the personal recognizance and the deposit situations.

There is also, however, no retention charge to the accused who deposits the full amount of cash bail or securities or real estate. Yet the administrative cost attendant upon the 10% deposit and that upon the full deposit are, by the stipulation, "substantially the same" with, indeed, any higher cost incurred with respect to the full deposit.

This perhaps is a more tenuous distinction, but we cannot conclude that it is constitutionally vulnerable. One who deposits securities or encumbers his real estate precludes the use of that property for other purposes. And one who deposits the full amount of his bail in cash is dispossessed of a productive asset throughout the period of the deposit; presumably, at least, its interim possession by the State accrues to the benefit of the State. Further, the State's protection against the expenses that inevitably are incurred when bail is jumped is greater when 100% cash or securities or real estate is deposited or obligated than when only 10% of the bail amount is advanced. The Joint Committee's and the State Legislature's decision in balancing these opposing considerations in the way that they did cannot be de-

[11] Tr. of Oral Arg. 27.

scribed as lacking in rationality to the point where equal protection considerations require that they be struck down.

Rinaldi v. *Yeager*, 384 U. S. 305 (1966), lends no support to the appellants here. In that case a New Jersey statute imposed the cost of a transcript upon the indigent appellant who had been convicted of a crime and was sentenced to prison and who then was unsuccessful on his appeal. The statute, however, did not impose that cost upon the indigent appellant who likewise was convicted of a crime, and was unsuccessful on his appeal, but who had received a suspended sentence or who had been placed on probation or who had been fined rather than sentenced to prison. The distinction the New Jersey statute drew between appellants was based only upon the nature of their punishment, and the burden was imposed only upon those who were confined. The Court held, and rightly so, that a punishment distinction had no rational connection with a transcript cost and served to deny equal protection to the convicted appellant whose liberty was at issue on the appeal. MR. JUSTICE STEWART, in speaking for the Court, said,

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. 'The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.' Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have

'some relevance to the purpose for which the classification is made.'" 384 U. S., at 308–309 (citations omitted).

The New Jersey distinction thus was invidious and without rationality for it was not related to the fiscal objectives of the statute and rested on no administrative convenience.

B. The poor-man-affluent-man argument centers, of course, in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), and in the many later cases that "reaffirm allegiance to the basic command that justice be applied equally to all persons." *Williams* v. *Illinois*, 399 U. S. 235, 241 (1970).

In no way do we withdraw today from the *Griffin* principle. That remains steadfast. But it is by no means certain, as the appellants suggest, that the 10% deposit provision under § 110–7 is a provision for the benefit of the poor and the less affluent and that the full-deposit provision of § 110–8 is one for the rich and the more affluent. It should be obvious that the poor man's real hope and avenue for relief is the personal recognizance provision of § 110–2. We do not presume to say, as the appellants in their brief intimate,[12] that § 110–2 is not utilized by Illinois judges and made available for the poor and the less affluent.

Neither is it assured, as the appellants also suggest, that the affluent will take advantage of the full-deposit provision of § 110–8, with no retention charge, and that the less affluent are relegated to the 10% deposit provision of § 110–7 and the 1% retention charge. The record is silent, but the flow indeed may be the other way. The affluent, more aware of and more experienced in the marketplace, may see the advantage, in these days

[12] "Thus, those least able to afford it, the poor and non-affluent, who have no choice but to remain in jail or deposit 10% of bail, are unconstitutionally 'penalized in a quest for justice due to a lack of wealth.'" Appellants' Brief 16.

of high interest rates, in retaining the use of 90% of the bail amount. A 5% or greater return on this 90% in a short period of time more than offsets the 1% retention charge. In other words, it is by no means clear that the route of § 110–8 is more attractive to the affluent defendant than the § 110–7 route. The situation, therefore, wholly apart from the fact that appellant Schilb himself has not pleaded indigency, is not one where we may assume that the Illinois plan works to deny relief to the poor man merely because of his poverty.

C. The court-cost argument is that the person found innocent but already "put to the expense, disgrace and anguish of a trial" is "then assessed a cost for exercising his right to release pending trial." [13] *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966), is cited. *Giaccio* was a holding that an ancient Pennsylvania statute that permitted the jury to impose court costs upon an acquitted defendant, in order to offset the expenses of prosecution, violated the Due Process Clause because of vagueness and the absence of any standards preventing the arbitrary imposition of costs. The Court thus did not reach the merits, although MR. JUSTICE STEWART and Mr. Justice Fortas, each separately concurring, 382 U. S., at 405, felt that the very imposition of costs upon an acquitted defendant was violative of due process.

Giaccio is not dispositive precedent for the appellants here. Certainly § 110–7 is not subject to attack for vagueness or for lack of standards. Neither is it a vehicle for the imposition of costs of prosecution as was the Pennsylvania statute. Instead, § 110–7 authorizes retention of the 1% as "bail bond costs." This is what that description implies, namely, an administrative cost imposed upon all those, guilty and innocent alike, who

[13] Appellants' Brief 16.

seek the benefit of § 110–7. This conclusion is supported by the presence of the long-established Illinois rule against the imposition of costs of prosecution upon an acquitted or discharged criminal defendant, *Wells* v. *McCullock,* 13 Ill. 606 (1852), and by the Illinois court's own determination, 46 Ill. 2d, at 551–552, 264 N. E. 2d, at 384, that the charge under § 110–7 (f) is an administrative fee and not a cost of prosecution imposed under Ill. Rev. Stat., c. 38, § 180–3 (1969), only upon the convicted defendant.

V

Finally, the appellants would point out that Article 110 has its federal counterpart in § 3 (a) of the Bail Reform Act of 1966, Pub. L. 89–465, 89th Cong., 2d Sess., 80 Stat. 214, and in particular in that portion now codified as 18 U. S. C. § 3146 (a)(3). They note that S. 2840, 88th Cong., 2d Sess., contained a 1% retention provision "to defray bail bond costs" but that a parallel bill, S. 1357, 89th Cong., 1st Sess., as it progressed through Congress, at no time had a provision of that kind. It was S. 1357 that was enacted as Pub. L. 89–465.

The committee reports, S. Rep. No. 750, 89th Cong., 1st Sess., and H. R. Rep. No. 1541, 89th Cong., 2d Sess., accompanying the 1966 Act, and the debates, 112 Cong. Rec. 12488–12504, 12841–12843, make no reference to this change from the earlier S. 2840. In the face of this silence, and without more, and being cognizant of the fact that the federal act, unlike the Illinois one, was not directed against the professional bail bondsman, we are not inclined to read constitutional implications into the absence of the retention provision in the Bail Reform Act of 1966.

Neither are we inclined to read constitutional implications into either the presence or the absence of a

retention provision in corresponding statutes of States other than Illinois. See N. Y. Laws 1936, c. 518, N. Y. Code Crim. Proc. § 586.3 (Supp. 1970–1971), having a 2% fee provision, now replaced by §§ 520.10–520.30 of New York's new Criminal Procedure Law, effective September 1, 1971, without the provision. See Wis. Stat. §§ 969.02 (5) and 969.03 (1)(c) (1969), where a 1% fee is specified but not upon dismissal or acquittal. See Alaska Stat. § 12.30.020 (b)(4) (Supp. 1971); D. C. Code Ann. § 23–1321 (a)(3) (Supp. 1971); and Iowa Code Ann. § 763.16.1c. (Supp. 1971), in each of which a 10% deposit is authorized with no fee-retention provision.

VI

We refrain from nullifying this Illinois statute that, with its companion sections, has brought reform and needed relief to the State's bail system. The judgment of the Supreme Court of Illinois is

Affirmed.

MR. JUSTICE MARSHALL, concurring.

I join the opinion of the Court with a few additional words.

All agree that the central purpose of the statute was to restrict severely the activities of professional bail bondsmen who had customarily collected 10% of the amount of each bond as a fee and retained all of it regardless of what happened. All agree that the new scheme is, in general, an admirable attempt to reduce the cost of liberty for those awaiting trial.

The new scheme dealt only with the class of which appellant Schilb was a member—those persons charged with crimes who under the old system were relegated to professional bondsmen who along with other requirements charged a 10% fee for the bond regardless of

the outcome of the case. This is the only class affected by the new scheme. Members of this class now pay 1% instead of 10%. In the evolving struggle for meaningful bail reform I cannot find the present Illinois move toward that objective to be unconstitutional.

MR. JUSTICE DOUGLAS, dissenting.

Appellant John Schilb brought this class action on behalf of all criminal defendants against whom the Clerk of the Circuit Court of St. Clair County, Illinois, had assessed fees of 10% of the amounts deposited as bail bonds. At issue was Ill. Ann. Stat., c. 38, § 100–7 (a) (1970), which allowed a defendant to be released from custody upon "deposit with the clerk of the court . . . a sum of money equal to 10% of the bail" which had been set by the court. Appellant challenged, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, the provision that "the clerk of the court . . . retain as bail bond costs 10% of the amount [so] deposited." *Id.*, at § 110–7 (f). He argued that this was an unconstitutional discrimination because bail bond costs were not imposed upon those who were released on their personal recognizance, *id.*, at § 110–2, or those who deposited cash or other security in the full amount of the bail bond. *Id.*, at § 110–8.

The Circuit Court found the statute constitutional and dismissed the complaint. The Supreme Court of Illinois affirmed the judgment, 46 Ill. 2d 538, 264 N. E. 2d 377; we noted probable jurisdiction, 402 U. S. 928.

The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. In theory, courts were to set such amounts and conditions of bonds as were necessary

to secure the appearance of defendants at trial.[1] Cf. *Stack* v. *Boyle*, 342 U. S. 1 (1951). Those who did not have the resources to post their own bond were at the mercy of the bondsman who could exact exorbitant fees and unconscionable conditions for acting as surety.[2] See A. Beeley, The Bail System in Chicago 39 (1927); D. Freed & P. Wald, Bail in the United States: 1964, p. 34 (1964); R. Goldfarb, Ransom 92–126 (1965); Ares & Sturz, Bail and the Indigent Accused, 8 Crime & Delinquency 12 (1962); Boyle, Bail Under the Judicial Article, 17 De Paul L. Rev. 267, 272 (1968); Note, 106 U. Pa. L. Rev. 693 (1958); Note, 102 U. Pa. L. Rev. 1031 (1954). Criminal defendants often paid more in fees to bondsmen for securing their release than they were later to pay in penalties for their crimes. Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35, 36.

Moreover, the commercial bond system failed to provide an incentive to the defendant to comply with the

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[1] A study by the Champaign County Bar Association indicated that bail was often set at a higher amount than necessary to satisfy these objectives:

"Among the bail practices noted in this report were the following: (1) Bonds of $2,000, $3,000, or even $5,000 are fixed in cases where the accused ultimately is fined $50 or less. (2) Permitting an accused to sign his own bond without sureties is rarely allowed. (3) Personal bonds of local citizens who own property or have been local residents for many years are frequently refused. (4) Magistrates frequently fix a bond of $1,000 or so for a minor crime, and when the case is transferred a few days later to the County or Circuit Court by the filing of an information the accused must provide a second bond for the same minor crime." Bowman, The Illinois Ten Per Cent Bail Deposit Provision, 1965 U. Ill. L. F. 35.

[2] In 1962 in Cook County, for example, professional bail bondsmen wrote bonds totaling $18,513,965 entitling them to receive $1,851,396 in fees. These bondsmen, however, paid forfeiture judgments of only $183,938. *Id.*, at 36.

terms of his bond. Whether or not he appeared at trial, the defendant was unable to recover the fee he had paid to the bondsman. "No refund is or was made by the professional surety to a defendant for his routine compliance with the conditions of his bond." Kamin, Bail Administration in Illinois, 53 Ill. B. J. 674, 678 (1965).

It was in response to the abuses and inequities of the commercial bonding system that Illinois enacted the statutory scheme now under attack.[3] The Supreme Court of Illinois indicated "that the central purpose of the legislature . . . was to severely restrict the activities of professional bail bondsmen who customarily collected 10% of the amount of a bond as a fee which was retained whether or not the conditions of the bond were met by the accused." 46 Ill. 2d, at 544, 264 N. E. 2d, at 380. To accomplish this end, it was only necessary to deal with the class represented by appellant. Those defendants who posted security in the full amount of the bail bond or who were free on their own recognizance stood

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[3] The primary argument advanced in favor of retaining the commercial bond system was that the professional bondsman would, at his own expense, track down and recapture a defendant who jumped bail. This argument was found by the Illinois Legislature to have only tenuous factual support:

"As to the value of bondsmen being responsible for the appearance of accused and tracking him down and returning him at the bondsman's expense—the facts do not support this as an important factor. While such is accomplished occasionally without expense to the county, the great majority of bail jumpers are apprehended by the police of this and other states. Since bail jumping is now a distinct and separate crime, and with the nation-wide exchange of information between law enforcement agencies and the F. B. I., the average bail jumper has little chance of escape. The facts show that most of them are recaptured in this state, and even in the same county where they are to appear." Committee Comments—1963, Ill. Ann. Stat., c. 38, p. 300 (Smith-Hurd ed. 1970).

in the same financial position under the new statutory scheme as under the old. No costs have ever been imposed upon them and any security deposited has always been returned upon the satisfaction of the terms of the bond.

Those defendants who under the old system had utilized the services of the professional bondsman are now required to post with the clerk of the court 10% of the face amount of their bonds in order to win their release. The significant difference, however, is that upon satisfaction of the terms of their bonds, § 110–7 now allows them to recover 90% of the amount deposited, while no such recovery was ever had from the commercial bondsman. Rather than paying a fee of 10% of the face amount of the bond, therefore, the cost is now only 1%.

Appellant urges that the new system of pretrial release is constitutionally deficient despite the improvement it has wrought. Appellant first argues that § 110–7 imposes costs upon only one class of criminal defendants without any rational basis for the classification. Next he asserts that the poor and nonaffluent, who have no choice but to remain in jail or deposit 10% of bail, are unconstitutionally penalized due to lack of wealth. Finally, he says that § 110–7 violates the Due Process Clause insofar as it allows costs to be taxed against an accused who is ultimately found innocent.

In response, appellees assert that the classification implements the laudable purpose of eliminating the commercial bail bondsman. Under this view, the 1% fee is no more than the interest charged for allowing an accused his freedom upon payment of only 10% of the amount set as bail. Appellees urge that a system which requires liberal use of an accused's release on his own recognizance, Ill. Ann. Stat., c. 38, § 110–2 (1970), and

which reduces to a fraction of the previous cost the financial burden on those required to post cash bonds, actually benefits the indigent.[4]

I do not reach the question of equal protection but rest my decision on the issue stirred, but not decided, in *Giaccio* v. *Pennsylvania,* 382 U. S. 399. The plaintiff in this action, John Schilb, was charged (1) with leaving the scene of an automobile accident and (2) obstructing traffic. He posted a 10% bond on each charge—one for $50 and one for $25; he was acquitted on the first one and was charged $7.50 on the two bonds.

The 1% charge is a part of the cost of a criminal prosecution, imposed even on an innocent person who is accused of a crime and who is put to the expense and anguish of a trial. *Giaccio* involved a state statute which directed juries "in all cases of acquittals" to determine whether the government or the defendant should pay the costs. 382 U. S., at 400–401. We held the Act unconstitutional on grounds of vagueness. MR. JUSTICE STEWART, concurring, said: "In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law." 382 U. S., at 405.

Mr. Justice Fortas also concurred, saying: "In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged." *Ibid.* That is my view on the merits in the instant case.

[4] Appellees note that a major portion of those defendants who avail themselves of the 10% bail provision are not indigent. A wealthy accused who could afford to pay either 10% or 100% of the amount set as bail might well elect to pay only 10% if the 1% cost thereby imposed would be less than the interest which could be earned if the 90% were retained and invested.

Some costs are the unavoidable consequences of a system of government which is required to proceed against its citizens in a public trial in an adversary proceeding. Yet I see no basis for saying that an accused must bear the costs incurred by the Government in its unsuccessful prosecution of him. Imposition of costs upon individuals who have been acquitted has long been eschewed by our courts. *E. g., State* v. *Brooks,* 33 Kan. 708, 715, 7 P. 591, 596 (1885); *Biester* v. *State,* 65 Neb. 276, 91 N. W. 416 (1902); *Childers* v. *Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938). Some jurisdictions have provided that the imposition of costs upon acquitted individuals is reprehensible. See, *e. g.,* Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48 (1952); Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice 31–32 (1963); Goldberg, Equality and Governmental Action, 39 N. Y. U. L. Rev. 205, 223–224 (1964); Note, 1962 Wash. U. L. Q. 76. Where there is such uniform condemnation of a practice as onerous as the imposition of costs upon acquitted defendants, cf. *Leland* v. *Oregon,* 343 U. S. 790, 798 (1952), I would conclude, with JUSTICES STEWART and Fortas in *Giaccio,* that it violates due process.

It is, however, said that the 1% charge is not "a vehicle for the imposition of costs of prosecution" and that it is merely "an administrative cost imposed upon all those, guilty and innocent alike, who seek the benefit of § 110–7." *Ante,* at 370, 370–371. The costs of administering the bail system occur, by definition, only during the course of criminal prosecutions. They are as much an element of the costs of conducting criminal cases as the prosecutor's salary, the fee for docketing an appeal, or the per diem paid to jurors. Nor does the rubric "administrative" require a contrary result. If this were the talisman through which a State could impose its costs upon acquitted defendants, I could see no stopping point

and we might be left with a system in which an acquittal might be nearly as ruinous to the defendant as a conviction.

On the other aspects of the case facts are absent which we would need to know if we are to make an informed judgment on the requirements of equal protection. The discrimination condemned is an "invidious" one, it being recognized over and again that "legislation may impose special burdens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U. S. 305, 309. The elimination of the professional bondsman seems to me to be a permissible end. The provision for the 10% bond is, in that view, an ameliorating one. The problem on which this record leaves us in the dark is the actual working of that provision and the provision for release on personal recognizance. Not everyone, I assume, is entitled to pretrial release. Equal protection would seem to require that each, whether rich or poor, Black or White, is entitled to release on personal recognizance if he meets the requirements of stability, reputation, community ties, and so on. In Illinois the record is silent [5]

[5] The Manhattan Bail Project which has been in operation since 1961 deals only with felony defendants:

"In evaluating whether the defendant is a good parole risk, four key factors are considered: (1) residential stability; (2) employment history; (3) family contacts in New York City; and (4) prior criminal record. Each factor is weighted in points. If the defendant scores sufficient points, and can provide an address at which he can be reached, verification will be attempted. Investigation is confined to references cited in the defendant's signed statement of consent." D. Freed & P. Wald, Bail in the United States: 1964, p. 59 (1964).

From 1961 to 1964 out of 13,000 defendants, 10,000 were interviewed, 4,000 were recommended for release on personal recognizance, and 2,195 were paroled. Of these, only 15 failed to show up in court, a default rate less than seven-tenths of one percent.

If Illinois' experience is comparable, it is understandable why those who pass muster on personal recognizance may be treated more

as to how the system of release on personal recognizance, as contrasted to release on the 10% bond, is in fact administered. The manner of administration may, of course, raise serious equal protection questions. For a statute fair on its face may be administered in an invidious way. As stated in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373–374:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

But, as I have said, the record contains no factual basis showing the manner of administration of the Illinois system.

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leniently than those who do not qualify for that kind of release. In that connection 60% of those released on personal recognizance in Manhattan were either acquitted or had their cases dismissed, compared with 23% of the others. *Id.*, at 63.

If that were the experience of Illinois, the State certainly could not be charged with making an invidious discrimination against the other group, even though the cost of administering the personal recognizance program was as high as the cost of administering the bail program. Cf. *Richardson* v. *Belcher*, *ante*, p. 78; *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U. S. 4 (1970); *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802 (1969); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955); *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61 (1913). Cost of administration is only one item for comparison. The lessened burden on the State accruing from the few convictions and the resultant jail term sentences is a factor that a State may take into consideration. Certainly if the Illinois experience parallels the Manhattan experience, we would be hard put to say that Illinois shows an invidious discrimination against those who can only make bail as compared with those who are qualified to be released on personal recognizance.

I would reverse this judgment insofar as it imposed bail bond costs under the criminal charges of which members of the class represented by appellant were acquitted and remand for further proceedings respecting the bail bond costs on the charges on which they were convicted.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN concurs, dissenting.

In 1963, Illinois enacted new provisions governing bail in criminal cases. Ill. Rev. Stat., c. 38, Art. 110 (1963). These enactments provide that a person charged with a criminal offense may obtain pretrial release in one of four ways.

(1) The accused may be released on his own recognizance Persons in this class do not pay any costs to cover the administration of their release. § 110–2.

(2) The accused may deposit 10% of the full amount of the bail that has been set. § 110–7. When bail is made in this manner, the clerk of the court ultimately retains as bail costs 1% of the full amount of bail (10% of the amount actually deposited). § 110–7 (f).

(3) The accused may offer cash, stocks or bonds in an amount equivalent to the required bail. No administrative costs are imposed. § 110–8 (a)(1).

(4) The accused may secure double the amount of required bail in unencumbered real estate. Again, no administrative costs are imposed. § 110–8 (a)(2) and (f).

A person must satisfy a judge that he meets certain criteria to be eligible for release on his own recognizance. Otherwise the State allows individuals to choose freely among the three other methods of obtaining pretrial release (assuming the individual has the wherewithal to make a choice).

The 1963 bail provisions of the Illinois Criminal Code represented substantial reforms in the State's procedures for granting pretrial release. The central purpose of the legislation was to restrict severely the activities of pro-

fessional bail bondsmen who had customarily collected 10% of the amount of a bond as a fee, which they retained whether or not the conditions of bond were met by the accused.[1] Before 1963, accused persons who could not obtain release on their own recognizance had no choice but to offer the full amount of the bail that was set. The primary innovation of bail reform was to create a class of "ten-percenters," persons who could gain release by depositing only 10% of the required bail.

Appellant John Schilb was charged with leaving the scene of an accident and obstructing traffic. Bail was set at $500 for the first offense and $250 for the second. As a "ten-percenter," the appellant posted $50 and $25 bonds. He was found guilty of the second charge and not guilty of the first. After these judgments were entered, the State retained $5 and $2.50 respectively, as administrative costs on his bonds. Subsequently, the appellant brought this class action against the clerk of the Circuit Court of St. Clair County, Illinois, alleging that the cost-retention provision of the state bail law, § 110–7 (f), constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment because administrative costs are imposed only on that class of persons who obtain pretrial release by depositing 10% of the required bail. The Illinois Supreme Court ultimately upheld the validity of § 110–7 (f), with two

[1] Other common abuses perpetuated by the bondsman system were overcharges of bail fees, failure to return security pledges to the owner, and retention of money reimbursements for forfeited bond judgments which were later vacated. D. Freed & P. Wald, Bail in the United States: 1964, p. 34 (1964). According to the appellees' brief, the Illinois reforms have apparently put an end to the activities of professional bondsmen. As the Illinois Supreme Court noted: "[T]he ultimate objective of this reform was to regain from professional bondsmen 'the control of bail releases and restore such control to the courts where it rightfully belongs.'" 46 Ill. 2d 538, 544, 264 N. E. 2d 377, 380–381 (1970).

justices dissenting. 46 Ill. 2d 538, 264 N. E. 2d 377 (1970).

It is common ground that the Illinois bail reform scheme reflects an admirable attempt to reduce the cost of liberty for those awaiting trial. Chapter 38, § 110–7 (f), does arbitrarily discriminate, however, against the appellant and those similarly situated.[2] As this Court said in *Rinaldi* v. *Yeager*, 384 U. S. 305:

> "The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes. It also imposes a requirement of some rationality in the nature of the class singled out. . . . [L]egislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have 'some relevance to the purpose for which the classification is made.'" *Id.*, at 308–309 (citations omitted).

The Court assumes that the rationality of § 110–7 (f)'s classification should be analyzed in relation to the purpose of ending the evils created by the bail bond system. However, while ending those evils is the aim of the whole bail reform, it is not the aim of § 110–7 (f) itself. Rather, the appellees have acknowledged that the purpose of § 110–7 (f) is to cover administrative costs; they have also acknowledged in oral argument that the financial burden on the State is probably as great or

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[2] I would decide this case solely on the ground that the provision in question arbitrarily discriminates between like classes of persons. I would not, therefore, reach the two other arguments urged by the appellants: that the provision arbitrarily favors the rich over the poor and that the provision violates due process by imposing costs on those who are ultimately found to be innocent.

greater for those who use the other methods of obtaining pretrial release.[3] Can the appellees constitutionally justify the selective imposition of administrative costs?[4] I think not.

The Illinois Supreme Court held that there can be no unconstitutional discrimination in the state system of bail release, since each person accused has a choice of method for obtaining pretrial release. 46 Ill. 2d, at

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[3] As the Court notes, the parties have stipulated that the "actual cost of administering the provisions of said Sections 110–7 and 110–8 are substantially the same but there may probably be a slightly higher cost in the administration of Section 110–8." With regard to those released on their own recognizance (under § 110–2) and the "ten-percenters," the respondents acknowledged at oral argument that the administration of release for both classes imposes equal costs on the State:

"MR. ROONEY: We think [those released on their own recognizance] are a little differently situated than those——

"QUESTION: Not expense wise to the system?

"MR. ROONEY: Not expense wise to the system . . . ." Tr. of Oral Arg. 19–20.

[4] The Bail Reform Act of 1966, 18 U. S. C. §§ 3141–3152, a federal law in some ways similar to Illinois' provisions governing bail, provides for "ten-percenters" at the discretion of the judge. However, it imposes no administrative costs on persons seeking pretrial release through the deposit of something less than the full bail required. 18 U. S. C. § 3146 (a)(3). Earlier versions of the legislation had imposed an administrative cost of 1% of the total bail required on those who elected to deposit 10%, S. 2840, 88th Cong., 2d Sess. (1964).

Several States allow persons to obtain pretrial release by depositing a sum less than the full amount set for bail. Two of these, Iowa, Iowa Code Ann. § 763.16.1c (Supp. 1971), and Alaska, Alaska Stat. § 12.30.020 (b)(4) (Supp. 1971), impose no administrative costs. Wisconsin imposes a cost only on those found guilty, Wis. Stat. § 969.03 (1)(c) (1969). New York until recently imposed a flat percentage fee on all who obtain pretrial release, regardless of method chosen. N. Y. Laws 1936, c. 518, and N. Y. Code Crim. Proc. § 586.3 (Supp. 1970–1971). There is now no fee. N. Y. Criminal Procedure Law §§ 520.10–520.30.

548, 264 N. E. 2d, at 382. Those who deposit 10%, said the court, "are not automatically placed in this class . . . by the law. They join only by the exercise of their own volition." Whether many persons accused of crimes can really choose between paying 10% or paying the full amount (or securing double the amount in real estate) is highly debatable.[5] But however that may be, it is clear that not every person accused of a crime is free to choose to be released on his own recognizance. Yet those who are fortunate enough to be so released need pay no costs whatever.

The appellees argue that those who pay only 10% are being given a benefit that justifies imposing a burden. The appellees say that such persons are not required to put up the full amount of the bail set and that the 1% such persons do ultimately pay is a boon by comparison to the 10% of required bail that they would have automatically forfeited to the bondsman under the old procedures governing bail. This justification, however, also fails to distinguish between the "ten-percenters" and those who are released on their own recognizance. Obviously, those released on their own recognizance receive an even greater benefit than those who deposit 10%, since they give no money to the State at any time if they meet the conditions of release.[6]

[5] The dissent in the Illinois Supreme Court took "judicial notice of the fact that many defendants cannot afford to pay the full amount of the bail." 46 Ill. 2d, at 553, 264 N. E. 2d, at 385. From this basic fact it can be argued that, since many of those accused have no choice but to deposit 10%, the imposition of administrative costs upon that class alone amounts to a violation of the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. *Griffin* v. *Illinois*, 351 U. S. 12.

[6] The appellees contend that those who offer the full amount of bail in cash actually pay an administrative cost because they sacrifice the interest that would accrue on the money. Howeyer, this argument totally fails to meet the objection raised with regard to

The appellees attempt to distinguish between those released on their own recognizance and the "ten-per-centers" by noting that the recognizance practice is "historic," whereas the cost-retention provision was recently enacted to end the evils spawned by bail bondsmen.[7] This distinction, however, does not confront the reality that both classes of persons receive benefits and only one class must pay administrative costs. A second attempt to distinguish between those released on their own recognizance and those who deposit 10% turns on the idea that the members of the former class are more "worthy" of the benefit they receive and therefore may rationally be required to pay less. But while the criteria used by judges to determine release on one's own recognizance—*e. g.*, length of residence in the jurisdiction, marital status, employment record, or past criminal record—are obviously relevant to the recognizance decision, they are

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those released on their own recognizance. Moreover, those who offer stocks or bonds or who secure property to obtain their release may not, apparently, lose any income that might accrue on those items during the period before trial. The statutory scheme governing bail does not by its terms provide for the State to receive interest, dividends, or rent on stocks or bonds or land. The record before us is silent on the question of Illinois practice with regard to the benefits that flow from those sources of income before trial. Stocks and bonds are deposited with the clerk of the court, but there is no indication that the accused does not continue to receive earnings. Similarly, the accused gives the State first lien on the real estate offered as bond, but there is no indication that the accused is deprived of the use of the land. Ill. Rev. Stat., c. 38, § 110–8 (1963).

[7] The Court refers to a statement made in oral argument that the State of Illinois has never imposed costs on those who obtain release on their own recognizance. But under the rules governing pretrial release which existed before the 1963 reforms, the State did not impose administrative costs on *anyone* obtaining pretrial release. 46 Ill. 2d 538, 264 N. E. 2d 377. The question here is whether the current, selective imposition of administrative costs by the State is constitutional.

not rationally related to the decision to impose purely administrative costs, especially when such costs are at least as great for those released on their own recognizance as for those required to post bond.

Given the infirmities in the asserted justifications for § 110–7 (f), I think the imposition of administrative costs on only one class of those persons seeking pretrial release violates the Equal Protection Clause of the Fourteenth Amendment. Accordingly, I would reverse the judgment before us.